No. 99-2036-CFX Title: Good News Club, et al., Petitioners
v.
Milford Central School

Docketed: June 20, 2000 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Jun 19 2000	Petition for writ of certiorari filed. (Response due July 20, 2000)
	Jul 19 2000	Brief amici curiae of Alabama, et al. filed.
	Jul 20 2000	Brief of respondent Milford Central School in opposition filed.
	Jul 20 2000	LODGING consisting of 11 bound copies of deposition submitted by counsel for the respondent.
	Aug 2 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 3 2000	Reply brief of petitioners Good News Club, et al. filed.
	Oct 2 2000	REDISTRIBUTED for Conference of October 6, 2000
	Oct 10 2000	Petition GRANTED. SET FOR ARGUMENT February 28, 2001. **********
	Nov 8 2000	Order extending time to file brief of petitioner on the merits until November 30, 2000.
	Nov 29 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
	Nov 29 2000	Joint appendix filed.
	Nov 30 2000	Brief of petitioners The Good News Club, et al. filed.
	Nov 30 2000	LODGING consisting of twenty bound copies of exhibits submitted by counsel for the petitioner.
	Nov 30 2000	Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed.
	Nov 30 2000	Brief amici curiae of Christian Legal Soc.& Union of Orthodox Jewish Congregations filed.
	Nov 30 2000	Brief amici curiae of American Center for Law & Justice, et al. filed.
	Nov 30 2000	Brief amici curiae of National Council of Churches, et al. filed.
	Nov 30 2000	Brief amicus curiae of Solidarity Center for Law & Justice filed.
	Nov 30 2000	Brief amicus curiae of Wallbuilders, Inc. filed.
	Nov 30 2000	Brief amicus curiae of Sally Campbell filed.
	Nov 30 2000	Brief amicus curiae of Douglas Laycock filed.
	Nov 30 2000	Brief amicus curiae of Liberty Legal Institute filed.
	Nov 30 2000	Brief amici curiae of Child Evangelism Fellowship, et al. filed.
	Nov 30 2000	Brief amicus curiae of Carol Hood filed.
	Nov 30 2000	Brief amici curiae of Northstar Legal Center and Bronx Household of Faith filed.
	Nov 30 2000	Brief amicus curiae of Liberty Counsel filed.
	Nov 30 2000	Brief amici curiae of Alabama, et al. filed.
	Nov 30 2000	Brief amici curiae of Elliott Abrams, et al.(Theologians and Scholars of Religion) filed.
	Dec 13 2000	Blanket consent to the filing of amicus briefs in

No. 99-2036-CFX

Entry	Date	Proceedings and Orders
		support of either party received from counsel for the respondent.
	Dec 19 2000	Order extending time to file respondent's brief on the merits to and including January 12, 2001.
	Jan 11 2001	Brief amicus curiae of New York State School Boards Association filed.
	Jan 11 2001	Brief amici curiae of Anti-Defamation League, et al. filed.
	Jan 12 2001	Brief amici curiae of National School Boards Association, et al. filed.
	Jan 12 2001	Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
	Jan 12 2001	Brief amicus curiae of American Jewish Congress filed.
	Jan 12 2001	Brief of respondent Milford Central School filed.
	Jan 19 2001	CIRCULATED.
	Feb 2 2001	Record filed.
	Feb 2 2001	Record filed.
	Feb 15 2001	Reply brief of petitioners Good News Club, Andrea Fournier,and Darleen Fournier filed.
	Feb 28 2001	ARGUED.

(1) Supreme Court, U.S.
FILED

992036 JUN 19 2000

OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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June 16, 2000

116pp

QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution?

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The Petitioners are the Good News Club, Andrea Fournier, and Darleen Fournier. The Good News Club is an unincorporated association, which has no parent or subsidiary companies.

Respondent is Milford Central School, a public school organized under the laws of the State of New York.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Good News Club, Andrea Fournier, and Darleen Fournier, respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the Court of Appeals' holding in *Good News Club v. Milford Central School*, 202 F.3d 503 (2000), that Respondent may, without violating the First Amendment, open its facilities to the public for "the purpose of instruction in any branch of education, learning or the arts," but exclude members of the public who wish to engage in instruction "for religious purposes."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *The Good News Club v. Milford Central School*, is reported at 202 F.3d 502 (2nd Cir. 2000) and appears in Appendix A. The opinion of the United States District Court for the Northern District of New York is reported at 21 F. Supp 2d 147 (N.D.N.Y. 1998) and appears in Appendix C.

STATEMENT OF JURISDICTION

The petitioners seek review by writ of certiorari from the decision of the Second Circuit Court of Appeals entered February 3, 2000. The Second Circuit denied a timely petition for rehearing on March 21, 2000. *See* Appendix B. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND REGULATIONS

The relevant portions of the Milford Community Use of School Facilities are as follows (the entire text of the Policy appears in the Appendix D):

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:
>
> I. For the purpose of instruction in any branch of education, learning or the arts.
>
> [Paragraph 2 is omitted]
>
> III. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.
>
> [Paragraphs 4-7 are omitted]
>
> Use for Nonreligious Purpose: School premises shall not be used by any individual or organization for religious purposes. (Emphasis in original).

STATEMENT OF THE CASE

A. The Facts of the Case[1]

1. Milford's Policy for Community Use of its Facilities

This case is about discrimination in a small upstate New York community called Milford. The public school there, Milford Central School ("Milford"),[2] has opened its facilities for use by speakers for a host of purposes, but has shut its doors to those speakers with "religious purposes."

Milford has adopted a formal policy that governs use of its facilities by community groups. There are two sweeping provisions that are relevant to this case.

The policy's first provision opens the school to community speakers on an incalculable number of subjects. Speakers may use the school for "the purpose of instruction in any branch of education, learning or the arts." Milford's Superintendent Peter Livshin testified that this provision permits speakers to teach children moral values from secular literature like Aesop's Fables.

---

[1] The parties stipulated that there was no material dispute of fact. Petitioners have provided in the appendix (1) GNC's statement of undisputed facts, Appendix E, (2) Milford's statement of undisputed facts, Appendix F, and (3) GNC's response to Milford's statement. Appendix G. Milford chose not to submit a response to GNC's statement of undisputed facts.

[2] Milford has a small single school building that houses all grades K-12.

Milford's policy also opens its facilities for "social and civic meetings, entertainment events, and other uses pertaining to the welfare of the community." Milford admits that pursuant to this provision community groups are welcome to utilize its facilities to "promote the moral and character development of children." Milford's Brief before the Second Circuit at p. 9. Moreover, Superintendent Livshin testified that the Boy Scouts may use school facilities to influence children's spiritual development.[3]

Although it seems that Milford's policy has thrown open the schoolhouse gate for after hours use by all speakers, there is one barrier to entry -- a speaker may not have a religious purpose. Milford's policy starkly and simply states that "School premises shall not be used by any individual or organization for religious purposes."

2. The Purpose of The Good News Club

The Good News Club ("GNC") is a nonsectarian Christian youth organization that develops children's moral values by using Bible stories, games, scripture, and songs in a fun setting. The Good News Club is

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[3] During his deposition, Superintendent Livshin testified as follows:

Q: "And if one of the purposes of the Boy Scouts is to influence a boy's character, development and spiritual growth, would the Boy Scouts still be allowed to use school facilities?"

A: "Yes."

Joint Appendix before the Second Circuit ("JA") at 186, ln. 19-23.

open to any child. Children are required neither to accept a statement of faith nor to swear an oath to God to be a member of the Club. Appendix H5 (¶41-45). GNC adopts a viewpoint that a relationship with God is necessary to implement and to make moral values meaningful. The Milford chapter of GNC has approximately 25 members (ages 6–12) and is led by Steve and Darleen Fournier.

GNC meetings center on a Bible story that teaches children a moral value. A brief prayer of thanksgiving opens a typical GNC meeting. Next a song is sung that references God. The children then play games designed to teach them a Bible verse that focuses on the moral value being taught that week. After the games, the children are told a Bible story that reflects a moral such as "do not be jealous." After the moral is presented, the children are then challenged to live out the value by trusting in God. Children are invited to see Ms. Fournier privately if they would like a time of individual discussion and prayer about establishing a relationship with God.

3. GNC Application to use Milford's Facilities

In the fall of 1996, GNC applied to use school facilities to conduct its meetings. GNC's application stated that club meetings consisted of a fun time of singing songs, hearing a Bible lesson, and learning scripture. That same day, Dr. Robert McGruder, then superintendent of Milford, informed GNC that it would not be permitted to use school facilities because "religious groups could not use the school building."

B. The Courts Below

Petitioners believed that Milford's exclusion of religious groups was illegal. GNC brought a civil

rights action pursuant to 42 U.S.C. § 1983. Relying on the Eighth Circuit decision in *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501 (8th Cir. 1994), which held that a public school cannot discriminate against Good News Clubs if it allows other youth groups like the Boy Scouts to use its facilities, GNC moved for and obtained a preliminary injunction to prevent Milford from enforcing its discriminatory ban against groups that have religious purposes.

Ultimately, the parties cross-moved for summary judgment. The district court vacated the preliminary injunction and granted Milford's motion. GNC appealed.

A divided panel of the Second Circuit affirmed the district court's decision. Judge Minor, writing for the majority, found that Milford had opened its facilities to allow groups to teach moral values and that GNC teaches "secular values such as obedience or resisting jealousy." 202 F.3d at 509.

Nevertheless, the majority held that Milford could discriminate against GNC. Critical to the majority's analysis was that GNC's speech went beyond the presentation of moral values and included the "Christian viewpoint." The court opined that "[t]he Christian viewpoint, as espoused by Reverend Fournier contains an additional layer [of speech]":

> [Because we are teaching morals from a Christian perspective, we would present that perspective, which is that] these morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the

> strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy.

Id. at 509-10.

This "additional layer" of speech, according to Judge Minor's opinion, transformed the subject matter of GNC's speech from teaching moral values from a Christian perspective to religious instruction. *Id.* at 510. Judge Minor concluded, therefore, that Milford's exclusion of GNC from its facilities was based on constitutionally permissible subject matter discrimination, rather than constitutionally impermissible viewpoint discrimination.

In arriving at its decision, the majority reached the opposite conclusion from the Eighth Circuit in *Good News/Good Sports Club v. Ladue School District*, 28 F.3d 1501 (8th Cir. 1994), "which decided the same question in what seems to be a substantially identical context." 202 F.3d at 511.

Judge Jacobs dissented from the majority's opinion and its rejection of precedent. Judge Jacobs would have adhered to the reasoning of the Eighth Circuit and would have found that Milford, like the school district in the *Good News/Good Sports Club* case, discriminated against GNC because of its Christian viewpoint. 202 F.3d at 512.

More significantly, the dissent concluded that the majority's analysis irreconcilably conflicted with this Court's decision in *Lamb's Chapel v. Center Moriches School Dist.*, 515 U.S. 384 (1993). 202 F.3d at 513.

The crux of Judge Jacobs's disagreement with the majority was that "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Id.* at 512. Judge Jacobs opined that "the subject matter (of morals and character) is 'secular' in the sense that it is often informed by secular perspectives; but *the subject matter does not change* when it is informed by viewpoints that are sectarian.... No one should be surprised that the religious viewpoint on morality looks very much like religion itself." Id. at 514. (Emphasis added.)

Thus, Judge Jacobs concluded, as did the Eighth Circuit, that "the club's message is in fact the teaching of morals from a religious perspective" and exclusion of the Club from use of school facilities violated the First Amendment. *Id.* at 515.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons:

(1) The Second Circuit explicitly rejected the collective wisdom of the Eighth Circuit in *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994), and the Tenth Circuit in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), and charted a unique course of First Amendment jurisprudence. This course has now been followed by the Fifth Circuit as well. *Campbell v. St. Tammany's School Board*, 206 F.3d 1273 (5th Cir. 2000). Because of the divergence of these precedents, the First Amendment has a different meaning in New York than in Missouri. Christian youth organizations

in the Second and Fifth Circuits have lost constitutional freedoms that are guaranteed to other similar groups located in the Eighth, Ninth, and Tenth Circuits.

(2) This Court's precedents have been displaced by the Second Circuit. The Second Circuit constructed a legal distinction between viewpoint discrimination and subject matter discrimination that this Court has rejected twice. This Court in *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993), and in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), refused to accept the argument that an invitation to establish a relationship with God transforms speech from a religious viewpoint on a subject matter into the subject matter of religion.

(3) The Second Circuit banished into legal oblivion this Court's admonition that governmental officials' inquiries into the significance of words and practices of religious speech unconstitutionally entangles the state with religion. *See Widmar v. Vincent*. 454 U.S. 263 (1981). The Second Circuit explicitly invited government officials to examine the significance of religious speech and then make essentially theological determinations as to whether that speech constitutes religion, worship, or instruction.

I. The Decision of the Second Circuit Conflicts with Decisions of the Eighth, Tenth, and Ninth Circuit Courts Over the Proper Application of the *Lamb's Chapel* Standard to Religious Speech.

A. A direct conflict exists between the Second and Eighth Circuits regarding whether a school district that allows use of its facilities to youth groups to speak on the moral issues may discriminate against youth groups that seek to discuss the same topic from a religious viewpoint.

The Second Circuit's decision below conflicts with the Eighth Circuit's decision in *Good News/Good Sports Club*, 28 F.3d 1501, which "decided the same question in what seems to be a substantially identical context." *Good News Club*, 202 F.3d at 512.

In *Good News/Good Sports*, the Eighth Circuit dealt with the right of a Good News Club to use school facilities after school hours. The Ladue school district allowed the Boy Scouts use of its facilities, but refused to permit access by the Good News Club/Good Sports Club. 28 F.3d at 1503.[4] Access was denied solely because the group discussed moral development from a religious viewpoint.

A divided panel of the Eighth Circuit held that a school district could not deny use of its facilities to a religious youth group, if it allowed other youth groups such as the Boy Scouts to use them. The court concluded that the Good News/Good Sports club

[4] The Missouri club wanted to use school facilities to foster the moral development of junior high school students ... through prayer, Bible reading, and singing religious songs. 28 F.3d at 1503. This is essentially the same purpose for which the New York Club wanted to use to Milford school. *See Good News Club*, 202 F.3d at 513 (Judge Jacobs comparing the purposes of the two clubs).

wanted to speak on the same subject matter as the Scouts -- "moral character and youth development" and that the club's religious speech was a viewpoint on that subject matter. *Id.* at 1506. The school could not, therefore, consistent with this Court's holding in *Lamb's Chapel*, exclude the club from using school facilities.

Petitioners request that this Court grant their petition for a writ of certiorari to resolve the direct conflict between the Second and Eighth Circuits. Religious youth groups in the Second Circuit have lost constitutional freedoms that are guaranteed to identical groups located in the Eighth Circuit. Such incongruous interpretations of the First Amendment should not go unresolved by this Court.

B. There is a direct conflict between the Second Circuit and the Tenth Circuit as to whether a government forum can exclude moral instruction from a religious viewpoint when its permits others kinds of moral instruction.

The Second Circuit's decision below also conflicts with the Tenth Circuit's decision in *Church on the Rock*, *supra*, which decided that the prohibition of religious, but not secular, instruction violates the First Amendment.[5]

[5] Judge Minor's opinion never discussed *Church on the Rock* despite being raised by petitioners in their brief. Judge Minor, writing for a divided panel of the Second Circuit in *Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207, 214 (2nd Cir. 1997), recognized the *Church on the Rock* approach to *Lamb's Chapel* and explicitly declined to follow the Tenth Circuit. *Cf. Bronx Household*, 127 F.3d at 221 (Judge Cabranes in dissent

In *Church on the Rock*, the City of Albuquerque's senior center had a policy that discriminated against religious speech. The policy prohibited religious instruction, but allowed discussion of religious materials as literature, history, or philosophy. 84 F.3d at 1277.

The litigation emanated from a church's request to show a Christian film entitled *Jesus* at the city senior center. *Id.* The City denied the church's request and the church sued. The City argued that the discrimination against the church was permissible subject matter discrimination and not impermissible viewpoint discrimination. The Tenth Circuit rejected the City's argument:

> The film *Jesus* dealt with subject matter similar to that which would be included in a class on the Bible as literature. The film ran afoul of City policy, however, by advocating the adoption of the Christian faith.... Because the prohibited perspective, not the general subject matter triggered the decision to bar private expression, the City's policy is properly analyzed as a viewpoint-based restriction on speech.[6]

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would have followed the Tenth Circuit's decision.) Apparently, the court felt that this prior decision obviated the need to discuss the case.

[6] Milford's policy, as expressed by Superintendent Livshin closely mirrors the policy in *Church on the Rock*:

Q: "Pursuant to the description of the Good News Club as outlined in Exhibit D [the school use application which described the club's meetings as consisting of a fun time of singing songs, hearing a Bible lesson, and learning scripture], would the Good News Club qualify for use of the school facilities?"

A: "The problem that I have that I would need clarification on, children hear Bible story and learn Scripture, I don't know in what sense. Is the Scripture being presented – how do I want to say this? In a historical approach ... – or is it to be used to promote the gospel. And if that's indeed the case, then I have a problem with it in terms of using the school for that purpose."

JA195 (ln 20-23) – 196 (ln 1-15).

Moreover, even if the City had not previously opened the Senior Centers to presentations on religious subjects, its policy would still amount to viewpoint discrimination. Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

84 F.3d at 1273. [7] [Citations and internal quotations omitted.]

If Milford Central School were located in New Mexico rather than New York, the First Amendment would prohibit Milford from closing the doors to GNC meetings. First Amendments freedoms should not depend on geographical accidents. Petitioners, therefore, request that the Court grant their petition for a writ of certiorari to resolve the divergent interpretations of the First Amendment between the Courts of Appeals and set a uniform interpretation of the Constitution.

C. The Second and Fifth Circuits conflict with the Ninth Circuit over the proper application of *Lamb's Chapel* to speech that involves prayer.

In *Gentala v. City of Tucson*, ___ F.3d ___ (Nos. 97-17062, 97-1069, 9th Cir., April 20, 2000), the City of Tucson established a "Civic Events Fund." The Fund provided financial support for events relating to the historical, cultural, and ethnic heritage of the City and the nation. The Fund precluded reimbursement for events held in direct support of religious organizations.

Patricia and Robert Gentala applied to the Fund for reimbursement for the costs of city services for an event to celebrate the National Day of Prayer. Their application stated that the event was to organize a

[7] Milford's policy closely mirrors the policy in *Church on the Rock*. Milford's policy opens the school for "any instruction in any branch of education, learning or the arts," except teaching that school officials deem to be religious instruction.

gathering of Tucson Christians and that participants would be led in prayer for a variety of non-sectarian concerns.

The Fund denied the Gentalas' reimbursement request. The Gentalas sued the City, alleging the Fund's refusal to pay for cost of religious events violated the Free Speech Clause of the First Amendment.

A divided panel of the Ninth Circuit held that the Fund created a limited public forum. It further found that while the Gentalas' event had sectarian elements, it also had a civic character, and fit within the general subject matter of events for which the Fund was created. The court, relying on *Lamb's Chapel, supra* and *Rosenberger, supra* concluded that the City could not deny funds to a public prayer service merely because it would have brought a religious perspective to an otherwise permissible conversation.

The dissent, in contrast, would have adhered to the Second Circuit's reasoning in *Good News Club v. Milford Central School*, 202 F.3d 503 (2nd Cir. 2000) and the Fifth Circuit's reasoning in *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000) and as a result would have denied funding for the Gentalas' prayer service.[8]

[8] In *St. Tammany's School, supra*, the school opened its facilities, after school hours, for community use for civic purposes that pertain to the welfare of the community. 206 F.3d at 484. The policy, however, forbade the school from being used for religious services or religious instruction. *Id.* Sally Campbell requested to use the school for a "prayer meeting" at which she planned to discuss family and political issues, pray about those issues, and seek to engage in Biblical instruction with

The Court should grant this petition to resolve the conflict between the Second, Fifth, and Ninth circuits as to whether a group can be excluded from a forum because its speech, although on a permissible topic, adopts a religious perspective which includes prayers to God.[9]

II. The Decision of the Second Circuit Conflicts with this Court's Decision in *Lamb's Chapel v. Center Moriches School Dist.*, 515 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), which Prohibited Viewpoint Discrimination Against Religious Speakers.

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regard to those issues. The school excluded Ms. Campbell. The Fifth Circuit, adopting the decision in *Bronx Household of Faith*, upheld the exclusion as constitutional.

[9] *Culbertson v. Oakridge School District*, No. 99-35165 (9th Cir. argued March 2000) concerns the rights of a Christian youth group to have public school teachers distribute their informational materials on an equal basis with other after school clubs and to have equal access to school facilities to meet after school like other clubs. The United States District Court for the District of Oregon. *Culbertson v. Oakridge School District*, No. 96-6216-TC (D. Or. 1996) Chief Judge Michael Hogan granted the plaintiffs' motion and ordered that the school distribute plaintiffs' literature to the children and to allow plaintiffs access to school facilities after hours. The district court did not issue a written opinion. On January 5, 1999, the district court issued its order without a written opinion and Oakridge appealed.

The Second Circuit's analysis can not be squared with this Court's decision in *Lamb's Chapel, supra. Lamb's Chapel involved a New York school use policy identical to the policy involved in this case.* The policy allows all community speakers, except those with a religious purpose, to use school facilities.

In *Lamb's Chapel*, a church wanted to use the Center Moriches School auditorium for admittedly religious purposes. *Lamb's Chapel*, 508 U.S. at 389. The church proposed to show a six-part film series by Dr. James Dobson, the head of a national Christian evangelistic organization. *Id.* at 388. The film exhorted parents to fight "society's slide towards humanism" by instilling Christian values in their children and urged viewers to adopt a personal relationship with Jesus Christ to become better parents. *Id.* at 388-89, n.3.

The school denied the church use of its facilities because it had a religious purpose. Judge Minor, writing for the Second Circuit, upheld the school district's decision.

This Court, in reversing Judge Minor and the Second Circuit, noted that the issue was not whether the church's speech in *Lamb's Chapel* was religious, but whether it was speaking on child rearing from a religious standpoint. *Id.* at 393. Similarly in this case, Milford concedes that it has no objections to speakers promoting the moral and spiritual development of children. Milford objects only when the speaker adopts the viewpoint that a relationship with God is necessary to make the values meaningful. In other words, the subject matter is fine, but the religious viewpoint is not. As Judge Jacobs noted in his dissent below, the majority's analysis is difficult to square with this Court's decision in *Lamb's Chapel.*

Plaintiffs request the Court to grant their petitions to affirm the continued validity of this Court's analysis in *Lamb's Chapel.*

This Court dealt with substantially the same issues raised in this case in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).[10] In *Rosenberger*, a student organization requested, but was denied, indirect funding for a Christian periodical called *Wide Awake*. 515 U.S. at 825-27. The purpose of *Wide Awake* was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. Each issue of *Wide Awake* invited the students to accept Jesus Christ as their savior. *Wide Awake*'s essays on secular topics also invited students to establish a relationship with Christ.

Justice Souter, *in dissent*, concerned about the state funding of religion, concluded:

> *[Wide Awake]* is not merely the expression of editorial opinion that incidentally coincides with Christian ethics and reflects a Christian view of human obligation. It is straightforward exhortation to *enter into a relationship with God as revealed in Jesus Christ*, and to satisfy a series of moral obligations derived from the teachings of Jesus Christ. These are not the words of

[10] The Second Circuit's majority opinion never discussed *Rosenberger*, although petitioners relied upon it extensively in their main brief (p. 29-33) and in their reply brief (p. 2, 19).

> "student news, information, opinion, entertainment, or academic communicatio[n]," but the words of "challenge [to] Christians to live, in word and deed, according to the faith they proclaim and to consider what a personal relationship with Jesus Christ means." ... *It is nothing other than the preaching of the word* which (along with the sacraments) is what most branches of Christianity offer those called to the religious life.

Id. at 867-68 (internal citations omitted, emphasis added).

The dissenters in *Rosenberger* believed that *Wide Awake's* speech, by inviting students to accept Christ as their Savior, left the permissible realm of discussing secular subjects from a Christian perspective and entered the forbidden world of religious teaching. Thus, state funding of *Wide Awake* violated the Established Clause in the opinion of the dissenters.

The majority of the Supreme Court rejected the notion that *Wide Awake*'s speech, *(e.g.*, telling students that in order to overcome eating disorders or racism they needed a personal relationship with God), amounted to religious instruction. Rather, the Supreme Court held that *Wide Awake* presented a Christian perspective on how to overcome racism and eating disorders. Justice Kennedy opined that "[r]eligion may be a vast inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.

The Second Circuit has embraced the dissent's

logic, although this case involves access to facilities rather than funding of religious activities. Judge Minor found that by telling club members that they needed a personal relationship with God to carry out the various moral lessons, GNC's speech crossed the divide between discussing morals from a Christian perspective and religious teaching. *Good News Club*, 202 F.3d at 509-10.

Petitioners request that this Court grant certiorari to rectify the Second Circuit's failure to follow this Court's precedent in *Rosenberger*.

III. The Decision of the Second Circuit Conflicts with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) by Requiring Government Officials to Scrutinize and Classify Religious Speech and Thereby Entangling Government with Religion in an Unconstitutional Manner.

The Second Circuit called into question this Court's ruling in *Widmar v. Vincent*. 454 U.S. 263 (1981). In *Widmar*, this Court warned that inquiries into the significance of religious words and practices tend inevitably to entangle the state with religion in a manner forbidden by the constitution. *Widmar* 454 U.S. at 269-70. *Accord Rosenberger*, 515 U.S. at 844 (scrutinizing the content of speech lest it contain too great a religious content is inconsistent with the Establishment Clause). The Second Circuit ignored this warning and explicitly commended government officials for scrutinizing the significance of religious speech and then making essentially theological classifications as to whether that speech constitutes religion, worship, or instruction. *Good News Club*, 202 F.3d at 510. *But See Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207, 219-21 (2nd Cir. 1997) (Cabranes, J., dissenting) (where a church

desired to use school facilities for a Sunday worship service that contained religious instruction, the very act of classifying speech as religious instruction or worship "may deeply - and unconstitutionally - entangle public officials in theological determinations.")

Moreover, the Second Circuit failed to offer any framework or objective guidelines whatsoever to let government officials know when presenting morals from a religious viewpoint morphs into religious instruction. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (approving of placing unbridled discretion in the hands of government officials to determine speech rights). The absence of legal definitions and standards threatens to both embroil governments in litigation, and also to turn government officials into theological arbiters – a role best left to the church rather than the state. Petitioners ask this Court to grant their writ of certiorari.

IV. Summary Reversal Is Appropriate

The decision rendered by the Second Circuit so far departs from the teaching of this Court's three most relevant decisions (*Lamb's Chapel*, *Rosenberger*, and *Widmar*) that correction of the error is warranted. Indeed, the Second Circuit's rejection of this Court's precedent merits summary reversal.

CONCLUSION

Milford Central School has decided to open a forum, a market place, for community groups to promote the moral and spiritual development of children. GNC is forbidden from entering that marketplace and offering the children of Milford the opportunity to chose to hear about morality from a

religious perspective. The Second Circuit sanctioned Milford's discrimination. This is contrary to the conclusions that other Courts of Appeals have reached, contrary to the decisions of this Court, and contrary to our nation's most fundamental belief that the blessings of freedom and liberty are secured by a marketplace of ideas free from viewpoint discrimination.

This petition is worthy of the Court's attention. There are no prudential concerns that counsel against the granting of this petition. The facts are undisputed, Milford's policy is still in effect, and the Second Circuit clearly and explicitly rejected the collective wisdom of the Ninth, Eighth, and Tenth Courts of Appeals on the proper interpretation of this Court's decision in *Lamb's Chapel* and *Rosenberger*.

For the above stated reasons, plaintiffs respectfully request this Court to grant the petition for a writ of certiorari.

Submitted this 16th day of June 2000,

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THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLEEN FOURNIER, Plaintiffs-Appellants,

- v.-

MILFORD CENTRAL SCHOOL,

Defendant-Appellee.

Docket No. 98-9494

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

202 F.3d 502

June 23, 1999, Argued
February 3, 2000, Decided

COUNSEL: THOMAS J. MARCELLE, Slingerlands, NY, for Plaintiffs-Appellants.

FRANK W. MILLER, Ferrera, Fiorenza, Larrison, Barrett & Reitz, East Syracuse, NY for Defendant-Appellee.

Jay Worona, New York State School Boards Association, Inc., Albany, NY for the New York State School Boards Association, Inc., as amicus curiae.

JUDGES: Before: JACOBS, MINER and PARKER, Circuit Judges. Judge Jacobs dissents in a separate opinion.

MINER, Circuit Judge:

Plaintiffs-appellants The Good News Club (the "Club"), Darleen Fournier, and her seven-year-old daughter Andrea, n1 appeal from a summary judgment entered in the United States District Court for the Northern District

of New York (McAvoy, C.J.) in favor of defendant-appellee Milford Central School ("Milford" or "the school"). The action was brought to secure access to school premises for the purpose of conducting Club meetings, and the complaint contains demands for monetary as well as injunctive relief. The Club's claims are bottomed, *inter alia*, on the right to free speech under the First and Fourteenth Amendments. The district court found that the Club's activities were properly characterized as religious instruction and prayer and not the teaching of values or morals from a religious viewpoint. Accordingly, the court concluded that the school could properly exclude the Club because it had not opened its facilities for religious instruction or prayer.

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n1 For convenience, except where necessary for clarity, plaintiffs are collectively designated as "the Club" throughout this opinion.

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For the reasons that follow, we affirm.

BACKGROUND

In August of 1992, the Milford Central School District adopted a policy (the "Community Use Policy" or the "Policy") pursuant to § 414 of the New York State Education Law that governs the conditions under which outside organizations may utilize school facilities. The Community Use Policy provides that district residents may use school facilities for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall

be open to the general public," and otherwise consistent with state law. The Policy expressly forecloses use for religious purposes and requires that applicants certify that their proposed use complies with the Policy:

> School premises shall not be used by any individual or organization for religious purposes. Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Under the Community Use Policy, the school has allowed a number of organizations to use its facilities, including the Boy Scouts, the Girl Scouts, and the 4-H Club.

The Good News Club is a community-based Christian youth organization open to children between the ages of six and twelve. The Club takes its name from the "good news" of Christ's gospel and the "good news" that salvation is available through belief in Christ. The purported purpose of the Club is to instruct children in moral values from a Christian perspective. It is affiliated with an organization known as Child Evangelism Fellowship ("CEF"), a Christian missionary organization that oversees and provides support to chapters of The Good News Club throughout the country. Among other things, the CEF provides teaching materials, prayer booklets for distribution called the "Daily Bread" and training to Club leaders.

A typical Club meeting begins when the participating children, who range from kindergarten-age to sixth graders, arrive at the meeting site. If a child remembers

the "memory verse" from the previous week's meeting, she may recite it and is rewarded with a prize. The meeting officially opens with a prayer led by Reverend Stephen Douglas Fournier n2 that gives thanks and entreats God for His blessing on the meeting. The group then sings the Good News Club theme song, the lyrics of which refer to Jesus Christ and are generally "about . . . good news."

----------Footnotes----------

n2 Reverend Fournier is the husband of plaintiff-appellant Darleen Fournier, the father of plaintiff-appellant Andrea Fournier, and the pastor of Milford Center Community Bible Church. He is not a party to this action but describes himself as a "teacher" for the Club.

----------End Footnotes----------

The next segment of a Club meeting involves a "moral or value" lesson centered around a verse from either the Old or the New Testament and its teaching. To learn the "memory verse" for the lesson, the Club members play games that focus on repetition of the verse. Next, the children are told a Bible story that emphasizes the same moral value that is represented in the day's memory verse. The story concludes with a "challenge and invitation" segment, which challenges the children to live by the value taught in the day's lesson through trust in God and Jesus Christ. Depending on the elapsed time, when the story is concluded, the group leader may ask the children questions about the story or play a game that emphasizes the teaching in the story. The group may also sing a song that relates to the story.

The record includes a number of specific lesson plans provided by CEF for conducting Club meetings. n3 One

such lesson, taught by Darleen Fournier according to the lesson plan, is entitled "Israel Demands a King" from the series "David: A Man after God's Heart." The teaching of the lesson is centered around a verse from Ephesians 5:17, "wherefore be ye not unwise, but understanding what the will of the Lord is." According to the materials, the "teaching objective" is that "the saved child will desire God's best, allowing God to have first place in his life" and the "main teaching" is to "give God first place in your life."

----------Footnotes----------

n3 The materials from CEF contain, in their introduction, a list entitled "How to Lead a Child to Christ," which includes the following directives:

. Show him his NEED of salvation; that all persons are not going to Heaven; that no one in himself is good enough to go and the result of sin is forever separation from God (Romans 3:23; Revelation 21:27; John 8:21, 24).

. Show him the WAY of salvation. Salvation is a free gift because the Lord Jesus took our place on the cross, was buried and rose again from the dead (John 3:16; Ephesians 2:8; 1 Corinthians 15:3-4).

. Lead him to RECEIVE the gift of salvation, even Jesus Christ, by trusting Him as his personal Savior (John 1:12; Revelation 3:20).

. From the Word of God, help him find ASSURANCE of his salvation (John 3:36; Revelation 3:20; Hebrews 13:5).

. Lead him to CONFESS Christ (Matthew 10:32). This confession should be made to you, other

workers, later to his friends and as circumstances permit, in a public church service.

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The lesson plan distinguishes in the application of the memory verse between those children who are "saved" and those who are "unsaved." The lesson applies to the saved in that "if you have believed on the Lord Jesus as your Savior, one of the wisest decisions you can make is to give God first place in your life. Do and say those things that will please Him." As for the unsaved, "if you have never believed on Jesus to save you from sin, you can be sure this is the wisest and most important decision you will ever make. You will be given an opportunity later in class today to believe on Jesus." n4

- - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - -

n4 The emphasis for "unsaved" children is the same in each lesson plan: to accept Jesus Christ as their savior.

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The story in "Israel Demands a King" centers around events recounted in I Samuel 8-10, wherein the elders of Israel requested that Samuel appoint a king over them, contrary to God's will. Notwithstanding Samuel's warning of dire consequences, the people insisted that a king be appointed, and Samuel was directed by God to anoint Saul as the new king. Though Saul accepted the role as king, Samuel "felt sad for his people who had rejected God as their King. He knew this was not the best way. It could only lead to sorrow and trouble for them."

"Israel Demands a King" includes the following "Challenge and Invitation" segment:

CHALLENGE

If you have believed on the Lord Jesus, trusting Him to save you, will you remember this week that God's best for you is to give Him first place in your life? When you are tempted to allow other things to take over that special place, will you stop and think about all God has done for you? Remember what our memory verse says. (Say Ephesians 5:17 together.) Don't be foolish like the people of Israel, but understand that God's will for you is that you be a person after His own heart, giving Him first place in your life. If you have been allowing other things to have first place, confess that sin to God. Ask Him to help you keep Him first.

I have a slip of paper with a number one printed on it that says, "Keep God first this week!" You could put this paper on your mirror, by your bed or on your locker door at school. Let it be a reminder to you all week long to give God first place in your life.

INVITATION

God cannot be first in your life until you believe on Him as your Savior from sin. If you are willing to admit to God that you have sinned, and you believe that the Lord Jesus suffered and died to take the punishment for your sin and came alive again, you can be saved today. The Bible says, "Believe on the Lord Jesus Christ, and thou shalt be saved" (Acts 16:31). Will you believe on Him, trusting Him to save you? You can talk to the Lord right now. Say something like this: "Dear Lord Jesus, I do believe You died for me. I'm sorry for the wrong things I've done. Please take away my sin and help me obey You. Thank You for saving me today." (Ask those who prayed this prayer to meet you in a designated

> place after class so you can answer any questions they may have. Remind the children that if they did not pray now, they can talk to the Lord even after they leave.)

After the story, if time permits, the group leader shares a "missionary story" with the children, which is described by Reverend Fournier as a "fictitious story that deals with some part of the world where missionary activity is going on." n5 After the missionary segment, the group leader may play another game with the children and may award prizes based on recitation of the memory verse and on their performance in the games. If time allows, the group may sing another song. At various times throughout the meeting, the group may pray for "CEF missionaries" and to "receive Jesus as [a child's] personal Savior." The meetings adjourn after approximately one hour. In the course of the meeting, children are invited to meet with Darleen Fournier privately after the meeting for individual discussion and prayer. During the 1995-96 school year and into the fall of 1996, the Good News Club held its meetings at the Milford Center Community Church. During that time, the school provided bus transportation for some of the children and parents provided transportation for other children. In September of 1996, however, the school ceased providing bus service from the school to the church, which meant that some children were unable to attend Club meetings.

----------Footnotes----------

n5 The missionary stories "have to do with spreading the gospel." Reverend Fournier described one such story as follows:

> The missionary story for this quarter was of two young Haitian boys, one boy . . . goes to a Bible

> study and he invites the other boy to that Bible study, and that boy ends up going and the conflict that it causes with his father . . . in the end the father ends up going as well.

----------End Footnotes----------

Consequently, in September of 1996, Darleen Fournier, on behalf of the Good News Club, submitted a standard District Use of Facilities Request Form (the "Form") to Dr. Robert C. McGruder, Interim Superintendent of Schools in the Milford School District. The Form stated that the proposed use of the school's facilities was to have "a fun time of singing songs, hearing [a] Bible lesson and memorizing scripture." A few days after the request, Superintendent McGruder received a second request on behalf of the Good News Club from Reverend Fournier. On October 3, 1996, McGruder denied the requests in a letter, articulating that he understood the Good News Club's proposed use of the facilities to be "the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter."

On January 7, 1997, counsel for the Good News Club wrote to McGruder, asserting that McGruder's denial of access was in violation of the Club's "right to free speech, its right to equal protection of the law, and its rights under the Restoration of Religious Freedom Act," and noting that the school had previously allowed "other groups such as the Girl Scouts to use school facilities." The Club's attorney promised to bring suit if the school did not reverse its position and allow the Good News Club to use school facilities. Three days later, Milford's counsel requested materials to further clarify the nature of the instruction and activities that would take place at a Club meeting. The Club's counsel responded in a letter dated January 17, 1997, which contained the following

description:

> The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

The following week, the Good News Club's counsel forwarded a set of materials used or distributed by the Club. Among the materials submitted were a Good News Club invitation printed on an index card, a parental permission slip, a sample puzzle, and a copy of the "Daily Bread." This issue of the Daily Bread contained stories that refer to the second coming of Christ, accepting the Lord Jesus as the Savior, and believing in the Resurrection and in the descent of the Lord Jesus from Heaven.

After a review of the materials, Superintendent McGruder and counsel determined that "the kinds of activities proposed to be engaged in by the Good News Club are not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." On February 26, 1997, the Milford Board of Education adopted a resolution denying the Good News Club's request to use its facilities during the pendency of Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2d Cir. 1997). The substance of this resolution was transmitted to the Good News Club by letters dated February 28, 1997 and March 3, 1997. The

Good News Club filed a complaint in the United States District Court for the Northern District of New York on March 7, 1997, alleging claims under 42 U.S.C. § 1983 for deprivation of its rights to free speech under the First and Fourteenth Amendments, its right to equal protection under the Fourteenth Amendment, and its right to religious freedom secured by the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et seq. The Good News Club sought injunctive relief, damages and attorneys' fees.

On April 14, 1997, the district court preliminarily enjoined the school from enforcing its ban on the Club's use of school facilities. The court reasoned that there were sufficiently serious questions regarding the parties' understanding of the content of the Club's meetings to justify the injunction. On August 3, 1998, the parties cross-moved for summary judgment and, on September 25, 1998, stipulated to the facts of the case. In a Memorandum-Decision and Order dated October 23, 1998, the district court addressed the parties' cross-motions. The court began its analysis by noting that the First Amendment does not guarantee unbridled access to public property but that access to such property depends on the character of the property at issue and the nature of the proposed use. Given the dictates of New York Education Law § 414 and our previous decisions on the subject, the court concluded that the Milford school was a limited public forum. The court next considered whether the restrictions in the limited public forum passed constitutional muster, i.e., whether they were reasonable and viewpoint neutral. After an extensive review of the purposes of and activities associated with the Good News Club, the court concluded that the Club's activities constituted religious instruction and prayer. The court determined that the school had not previously allowed a group to use its facilities for religious instruction or prayer and that the

Club's attempted comparisons to the Boy Scouts, the Girl Scouts, and the 4-H Club were unpersuasive. In this regard, the court noted that, although the Boy Scouts "teach reverence and a duty to God," this was "only a part of its overall purpose[,] which is ... personal growth and development of leadership skills." Because the court found that the Club is a religious youth organization that proposed religious instruction and prayer and not an organization seeking to teach morals from a religious perspective, it dismissed the Club's free speech claim. The court thereafter dismissed the Club's equal protection claim under the authority of Bronx Household of Faith, 127 F.3d at 217 and entered judgment on October 23, 1998. n6 This appeal followed.

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n6 The court dismissed the Club's RFRA claim as moot in light of City of Boerne v. Flores, 521 U.S. 507, 536, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997).

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DISCUSSION

We review the district court's grant of summary judgment de novo. See Johnson v. Wing, 178 F.3d 611, 614 (2d Cir. 1999).

On appeal, the Good News Club presses as its sole contention that the First Amendment dictates that the Club cannot constitutionally be excluded from use of the Milford Central School facilities. n7 It argues that it seeks to use the facilities to teach morals and values, just as other organizations have done in school facilities. Thus, it asserts, to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination.

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n7 The Club has abandoned its equal protection and RFRA claims on appeal.

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The nature of permissible limitations on speech is based on "the nature of the forum in which the speech is delivered." Bronx Household of Faith, 127 F.3d at 211. There are three general types of forums in this regard: (1) traditional public forums, (2) designated or limited public forums, and (3) non-public forums. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Limited public forums are those that the government has designated as a "place . . . of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." Bronx Household of Faith, 127 F.3d at 211 (quotation omitted). We have previously held on a number of occasions that N.Y. Education Law § 414 and policies promulgated thereunder create limited public forums. See, e.g., Full Gospel Tabernacle v. Community Sch. Dist. 27, 164 F.3d 829, 829 (2d Cir. 1999) (per curiam), aff'g 979 F. Supp. 214, 220 (S.D.N.Y. 1997); Bronx Household of Faith, 127 F.3d at 215; Deeper Life Christian Fellowship, Inc. v. Board of Educ., ("Deeper Life I") 852 F.2d 676, 680 (2d Cir. 1988). Milford's Community Use Policy specifies who may use school facilities, when, and for what purposes. The parties agree, as they did in the court below, that the Milford school has created a limited public forum. In light of our precedent, the district court's conclusion, and the parties' agreement, we think it clear that the Community Use Policy has created a limited public forum in the Milford school facilities.

Restrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral. n8 See Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829-30, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); Bronx Household of Faith, 127 F.3d at 214. On appeal, the Good News Club challenges the application of both of these criteria. Taking first the reasonableness criterion, the Club argues that the restriction is unreasonable because Milford's articulated purpose for the restriction -- "ensuring that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof" -- is unpersuasive. It argues that there is little risk that children would confuse the Club's use of school facilities with the school's endorsement of the religious teachings.

----------Footnotes----------

n8 Milford argues that our inquiry should end with the observations that (1) the denial of permission to use school facilities was pursuant to the Community Use Policy and N.Y. Education Law § 414, and (2) § 414 has always been upheld as constitutional. In this regard, Milford presumes what it needs to prove: by their terms, § 414 and the Community Use Policy do not allow use of school facilities for religious purposes. See, e.g., Deeper Life Christian Fellowship, Inc. v. Sobol, ("Deeper Life II") 948 F.2d 79, 84 (2d Cir. 1991). If the Club's use is not a "religious use" but merely the teaching of morals from a religious viewpoint, however, Milford's exclusion of the Club would not comply with § 414 and its Community Use Policy and would be unconstitutional viewpoint discrimination.

----------End Footnotes----------

This argument is foreclosed by precedent. In Bronx Household of Faith, we stated that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." 127 F.3d at 214. Furthermore, "it is reasonable for state legislators and school authorities to avoid the identification of a . . . school with a particular church." Id. Although we made this pronouncement in the context of an organization requesting to conduct church services in a school, we believe it is equally applicable to the case now before us. The Club argues that it is not a "particular church," but rather a nondenominational Christian organization. This difference, however, is immaterial. The activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer, and we think it eminently reasonable that the Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club's teachings. This is especially so in view of the fact that those who attend the school are young and impressionable.

The crux of the Good News Club's argument is that the Milford school's application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral. In this regard, the Club posits that it is teaching moral values, just as the Boy Scouts, Girl Scouts, and the 4-H Club do. The Club contends that, unlike those organizations, it has been excluded because it seeks to teach these moral values from a Christian viewpoint. Though such teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier, contains an additional layer:

> These morals or these values are senseless without Christ, that's to the children who know

> Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy. n9

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N9 Reverend Fournier also stated in deposition testimony that the values require a relationship with Christ for them to be meaningful to God.

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We conclude, as did the district court, that the Good News Club is doing something other than simply teaching moral values. As we stated in Bronx Household of Faith, it "is not difficult for school authorities to make" the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer. 127 F.3d at 215. Although other cases may present difficult questions of line-drawing, we believe that the school authorities, after thorough inquiry and deliberation, correctly determined that the activities of the Club fall clearly on the side of religious instruction and prayer.

The activities of the Good News Club do not involve merely a religious perspective on the secular subject of morality. The Club meetings offer children the opportunity to pray with adults, to recite biblical verse, and to declare themselves "saved." The Club argues that these practices are necessary because its viewpoint is that a relationship with God is necessary to make moral values meaningful. Even accepting that this precept is

a viewpoint on morality and not a religious principle, it is clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious. See Davis v. Beason, 133 U.S. 333, 342, 33 L. Ed. 637, 10 S. Ct. 299 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.")

Particularly illuminating in this regard is a comparison to the plaintiffs' activities in Full Gospel Tabernacle, 164 F.3d at 829, aff'g 979 F. Supp. 214. Plaintiffs in Full Gospel Tabernacle were denied access to a school auditorium in which they wished to conduct "religious worship" services. See 979 F. Supp. at 217. The district court described the services in that case as follows:

> "We would come in and have what's called a group prayer, congregational prayer. Then we would go into praise and worship, sing different praise and worship songs accompanied by music. From there, [the Reverend] would get up and deliver the message, the service for that evening." Following [the Reverend's] sermon, the Reverends . . . engage in an "altar call," where they would "invite someone to receive the Lord as their Savior." The service would then conclude with a closing prayer.

Id. (internal citations to record omitted). It is difficult to see how the Club's activities differ materially from the "religious worship" described in Full Gospel Tabernacle: each has prayers and devotional songs; each has a central sermon or story with a message; each has a

portion in which attendees are called upon to be "saved." Applying a different label to the same activities does not change their nature or import.

In a limited public forum, "constitutional protection is afforded only to expressive activity of a genre similar to those that government has admitted to the limited forum." Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). Stated differently, for those who seek to speak on a topic or in a manner not contemplated by the public entity in opening the limited public forum "there is no fundamental right of freedom of speech." Bronx Household of Faith, 127 F.3d at 217. The Club attempts to liken its activities to "moral instruction" provided by groups such as the Boy Scouts, the Girl Scouts, and the 4-H Club. Thus, it argues, because the Milford school has permitted these organizations to use its facilities, the school may not exclude the Good News Club. We do not find this argument persuasive. While the Boy Scouts teach reverence and a duty to God generally, n10 this teaching is incidental to the main purpose of the organization, which is personal growth and development of leadership skills. Moreover, there is nothing in the record to indicate that the Boy Scouts require any particular means of demonstrating reverence and duty to God. Similarly, the Girl Scouts vow to "try . . . to serve God and [their] country." Even further afield is the attempted comparison to the 4-H Club, which seeks "to enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." Each of these organizations focuses on the development of youth in various ways; however, the record includes nothing to indicate that any of these clubs' activities remotely approach the type of religious instruction and prayer provided by the Club. Accordingly, the Milford school's decision to exclude the Good News Club from its facilities was based on content, not viewpoint. See, e.g.,

Rosenberger, 515 U.S. at 829-30; Bronx Household of Faith, 127 F.3d at 214-15 (distinguishing between permissible content-based distinctions and impermissible viewpoint-based distinctions in a limited public forum).

----------Footnotes----------

n10 The Scout Law requires that "[a] Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."

----------End Footnotes----------

The Good News Club leans heavily on the Eighth Circuit's holding in Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994). In Good News/Good Sports, the Eighth Circuit, over a dissent by Senior Circuit Judge Bright, ruled that the school district's exclusion of a Good News Club/Good Sports Club from its facilities constituted impermissible viewpoint discrimination. See id. at 1507. The policy at issue in Good News/Good Sports allowed use of school facilities outside of school hours only for "athletic activities" and Scout group meetings. See id. at 1503. The Eighth Circuit found that the policy's inclusion of the Scouts opened the forum to the subject of "moral and character development," the very same purpose for which the Good News/Good Sports Club sought access. Id. at 1506. Because it found that the only relevant difference between the Scouts and the Good News/Good Sports Club was viewpoint, the Eighth Circuit ruled that the Good News/Good Sports Club could not constitutionally be excluded from school facilities. See id. at 1507.

The Eighth Circuit apparently took for granted that the Good News/Good Sports Club's activities amounted only

to speaking on moral and character development. The opinion contains only a brief recitation of the types of activities that take place at a club meeting, but no examination of their import. See id. at 1502 ("The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. . . . Club activities include skits, singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models.")

Based on the record before us and this Circuit's precedent, we are constrained to find that the Club's activities fall outside the bounds of pure "moral and character development."

CONCLUSION

We have examined the Club's other contentions and find them to be without merit. For the foregoing reasons, the judgment of the district court is affirmed.

JACOBS, Circuit Judge, dissenting:

The area of my agreement with the majority is substantial. Thus I agree that the school district has created a limited public forum. See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567 (1985). And I recognize that restrictions on speech in a limited public forum withstand First Amendment scrutiny if they are reasonable and viewpoint-neutral. See Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 829-30, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995); Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 211-12 (2d Cir. 1997). "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn . . .

are viewpoint neutral." Cornelius, 473 U.S. at 806, 105 S. Ct. at 3451; accord Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93, 113 S. Ct. 2141, 2147, 124 L. Ed. 2d 352 (1993). In a limited public forum, content discrimination "may be permissible if it preserves the purposes of that limited forum"; but viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations." Rosenberger, 515 U.S. at 830, 115 S. Ct. at 2517. "The principle . . . 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" Lamb's Chapel, 508 U.S. at 394, 113 S. Ct. at 2147-48 (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 804, 104 S. Ct. 2118, 2128, 80 L. Ed. 2d 772 (1984)).

It is in the application of this standard to the facts of this case that I respectfully dissent.

* * *

In deciding this case, we are called upon to compare the subject matter of the speech offered by certain groups that are allowed to hold meetings at the Milford Central School with the subject matter of the speech proposed by the Good News Club. The majority posits (and I agree) that some groups allowed at Milford Central School present guidance on a range of common moral subjects, such as honesty and self-control. The majority then rules (and I agree) that the board is obliged to accept "an organization seeking to teach morals from a religious perspective." See Majority Opinion at [], [] [hereinafter "Maj. Op."].

The majority rules against Good News nevertheless on the basis of two complementary distinctions. First, although the school district would be obliged to accept

"an organization seeking to teach morals from a religious perspective," the school district is not obliged to accept a "religious youth organization that proposed religious instruction and prayer." See Maj. Op. at []. Second, the majority emphasizes that the Club discusses "religious material through religious instruction and prayer" rather than "secular subjects from a religious viewpoint." See Maj. Op. at [] (citing Bronx Household of Faith, 127 F.3d at 215).

On the basis of these two distinctions, the majority concludes that the Club's rejection was based solely upon the subject matter of its meetings and not upon its religious viewpoint. In my view, when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters.

Generally, I adhere to the opinion of the Eighth Circuit in Good News/Good Sports Club v. School Dist., 28 F.3d 1501 (8th Cir. 1994), which decided the same question in what seems to be a substantially identical context. In the Eighth Circuit case, the Good News/Good Sports Club (for convenience, the "Missouri Club") challenged a policy adopted by a school district in Missouri. The policy allowed various scouting organizations, as well as the school's sports teams, to use junior high school facilities after school, but denied access to other organizations. See id. at 1502-03 (providing access for Girl Scouts, Boy Scouts, Cub Scouts, Tiger Cub Scouts, and Brownies). The Missouri Club, along with its members and their parents, sought injunctive and declaratory relief under 42 U.S.C. § 1983 on the ground that the policy violated their First Amendment right to free speech. See Good News/Good Sports Club v. School Dist., 859 F. Supp. 1239, 1241 (E.D. Mo. 1993). The district court entered judgment in favor of the school district, but the Eighth Circuit reversed on the ground

that the Missouri Club and the scouting groups both offered messages on the topic of moral development, and that it was impermissible viewpoint discrimination to afford access to the Scouts while denying access to the Missouri Club solely because the latter's approach to moral development was religiously grounded. See Good News/Good Sports Club, 28 F.3d at 1505-07.

The Missouri Club and the Club in this case have nearly the same name and are nearly identical in their stated purposes and activities. Compare Good News/Good Sports Club, 28 F.3d at 1502 ("The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. . . . Club activities include skits, singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models. The Club is religious, but non-denominational."), with Good News Club v. Milford Central Sch., 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998) ("Although the Club is nondenominational, its stated purpose is to instruct children in family values and morals from a Christian perspective. . . . [A] typical meeting includes an opening prayer, singing of Christian songs, memorization, recital, and discussion of Biblical verses and scripture, and a closing prayer.").

The majority criticizes the Eighth Circuit opinion on the ground that it "apparently took for granted that the Good News/Good Sports Club's activities amounted only to speaking on moral and character development," and thereby adopted the unexamined assumption that the discrimination in question was viewpoint-based. Maj. Op. at []. As I read the Eighth Circuit opinion, however, the court carefully sifted the facts--facts substantially identical to those in the present case--in concluding that the rejection of the Missouri club was based on

viewpoint, not content. See Good News/Good Sports Club, 28 F.3d at 1505-07 & nn.7-9.

I cannot square the majority's analysis in this case with Lamb's Chapel v. Center Moriches Union Free School District. In Lamb's Chapel, the Supreme Court held that a school district violated the Free Speech Clause of the First Amendment when it refused to allow its auditorium to be used by a church for the showing of a film series that presented family issues from a Christian perspective. See Lamb's Chapel, 508 U.S. at 390-95, 113 S. Ct. at 2146-48. The school district's action denied church members the right to speak from their own perspective (Christian) on a topic (family issues) that would otherwise have been accommodated in the forum. See id. at 394, 113 S. Ct. at 2147 ("The film series involved here no doubt dealt with a subject otherwise permissible . . . and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.").

The majority asserts that the present case is controlled by our opinion in Full Gospel Tabernacle v. Community Sch. Dist. 27, 164 F.3d 829 (2d Cir. 1999) ("We affirm for substantially the reasons stated by Judge Haight in the decision below."), aff'g 979 F. Supp. 214 (S.D.N.Y. 1997), in which case a church sought to use school facilities for its church-wide "worship services." 979 F. Supp. at 216. But this case seems to me to be much closer to Lamb's Chapel than to Full Gospel Tabernacle. The majority here would distinguish the message of the Club from the message of the church in Lamb's Chapel--and from the message of the scout groups in this case--on the ground that the message of the Good News Club has an "additional layer" beyond simply teaching "secular values such as obedience or resisting jealousy." Maj. Op. at []. This "additional layer" is the Club's insistence that "these morals or these values are

senseless without Christ." Id. This distinction lacks traction, because Christ is also the central and animating spirit in the viewpoint expressed in the Lamb's Chapel films. Thus in one film, a spokesman on family life warns that the modern family is sliding away from spirituality and toward humanism, and that this slide "can only be counterbalanced by a loving home where Christian values are instilled from an early age." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 384 (2d Cir. 1992). I see no basis for saying that the message of the Good News Club has religious content and that the message of the movie is no more than a religious viewpoint on a secular subject.

The distinction between content discrimination and viewpoint discrimination is elusive and subtle. "Viewpoint discrimination is . . . an egregious form of content discrimination." Rosenberger, 515 U.S. at 829, 115 S. Ct. at 2516. "Discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one." Id. at 830-31, 115 S. Ct. at 2517 (internal citation omitted). The distinction is especially slippery where the viewpoint in question is religious, in part because the sectarian religious perspective will tend to look to the deity for answers to moral questions. The idea that moral values take their shape and force from God seems to me to be a viewpoint for the consideration of moral questions. True, religious answers to questions about morals and character tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith--not because the religious viewpoint is a change of subject:

> It is, in a sense, something of an understatement to

> speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. . . . Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.

Id. at 831, 115 S. Ct. at 2517 (emphasis added).

Although the religious viewpoint thus has the tendency to overwhelm the secularity of a subject matter, this transformative, goal-directed tendency of religious viewpoints does not justify a preference for other viewpoints.

Here, the subject matter is morals and character. The majority focuses on the evident fact that the Club's moral vision entails religious activity, and concludes that this makes the subject matter religious: "Each of these organizations [i.e., those granted access] focuses on the development of youth in various ways; however, the record includes nothing to indicate that any of these clubs' activities remotely approach the type of religious instruction and prayer provided by the Club." Maj. Op. at []. Perhaps not. But that observation begs the question: Does the "religious instruction and prayer provided by the Club" reflect and express this Club's viewpoint on morals and character? The subject matter (morals and character) is "secular" in the sense that it is often informed by secular perspectives; but the subject matter does not change when it is informed by viewpoints that are sectarian.

The Fourniers argue that presentation of Christian morality entails religious activities such as prayer, that their (religious) viewpoint on the "secular" topic of morality cannot be expressed and promoted without these religious activities, and that forcing them to do so

would prevent them from expressing their point of view, in violation of the First Amendment.

As the Eighth Circuit emphasized, the Supreme Court has "refused to cabin religious speech into a separate excludible speech category; rather, the Court [has] adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of seemingly secular subject matter." Good News/Good Sports Club, 28 F.3d at 1506-07. This insight has particular force where the "seemingly secular subject matter" is morals and character. No one should be surprised if a religious viewpoint on morality looks very like religion itself.

The school district allows use of its facilities by certain groups that focus on "moral development" of young people. The majority argues that the activities of the Club are "quintessentially religious," while the other groups deal only with the "secular subject of morality." Maj. Op. at []. The fallacy of this distinction is that it treats morality as a subject that is secular by nature, which of course it may be or not, depending on one's point of view. Discussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially--quintessentially--religious. "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'--all apparently forms of 'speech,' despite their religious subject matter--and become unprotected 'worship.'" Widmar v. Vincent, 454 U.S. 263, 269 n.6, 102 S. Ct. 269, 274 n.6, 70 L. Ed. 2d 440 (1981) (internal citation omitted). Because the Club's focus appears to be on teaching lessons for the living of a morally fit life, and not on worship, I believe that the Club's message is in fact the "teach[ing of] morals from

a religious perspective," Maj. Op. at [].

Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum.

* * *

Whenever public officials, in executing the school's access policy, evaluate private speech "to discern [its] underlying philosophic assumptions respecting religious theory and belief," the result is "a denial of the right of free speech." Rosenberger, 515 U.S. at 845, 115 S. Ct. at 2525. I would reverse the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

DC: NDNY
DC Docket: 97-cv-302
DC Judge: SHARPE

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of March, two thousand.

The Good News Club, Andrea Fournier and Darleen Fournier,

Plaintiffs-Appellants,

v. Dkt No: 98-9494
Milford Central School,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants The Good News Club, Andrea Fournier and Darleen Fournier

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc

has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN
B.MACKECHNIE, Clerk

By: - s -
Beth J. Meador,
Administrative Attorney

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THE GOOD NEWS CLUB, ANDREA FOURNIER, and DARLEEN FOURNIER, Plaintiffs,

-vs-

MILFORD CENTRAL SCHOOL, Defendant.

97-CV-0302

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

21 F. Supp. 2d 147

October 23, 1998, Decided
October 23, 1998, Filed

COUNSEL: Thomas Marcelle, Esq., OFFICE OF THOMAS MARCELLE, Slingerlands, New York, For Plaintiffs.

Frank W. Miller, Esq., FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., East Syracuse, New York, For Defendant.

JUDGES: Hon. Thomas J. McAvoy, Chief U.S. District Judge.

MEMORANDUM-DECISION & ORDER

McAVOY, CHIEF JUDGE:

Plaintiffs Good News Club ("Good News" or the "Club"), Andrea Fournier, and Darleen Fournier brought this action pursuant to 42 U.S.C. § 1983, alleging, inter alia, that defendant Milford Central School ("MCS" or "defendant") violated their free speech rights under the First Amendment to the United States Constitution by

denying them the use of the MCS cafeteria. On April 14, 1997, this Court preliminarily enjoined defendant from denying plaintiffs use of the cafeteria during non-school hours. Defendant now moves for summary judgment dismissing the Complaint. Plaintiffs cross-move for summary judgment on their free speech and equal protection claims.

I. Background

A. Facts

Good News is an unincorporated community-based Christian youth organization open to children between the ages of six and twelve. Although the Club is nondenominational, its stated purpose is to instruct children in family values and morals from a Christian perspective. The Club meets weekly for one hour and a typical meeting includes an opening prayer, singing of Christian songs, memorization, recital, and discussion of Biblical verses and scripture, and a closing prayer.

The Club is affiliated with Child Evangelism Fellowship ("CEF"), a Christian missionary organization that oversees and provides support to the Good News clubs throughout the country. n1 This support includes providing teaching materials, prayer booklets (the "Daily Bread"), and training, in return for which the Clubs pay a fee. Additionally, CEF provides "prayer support" for the instructors of the various Good News clubs. Defendant Darleen Fournier is in charge of the Club, defendant Andrea Fournier is a Good News member, and Steven Fourier, not named in the above matter, is a pastor and instructor at Good News.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n1 Tellingly, the Club's teacher, Steven Fournier defines

evangelism as "introducing children to Jesus Christ," and "fellowship" as "meeting downstairs in the church and having dinner." Dep. of Steven Fournier, at 48.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - -

The Club previously met at the Milford Center Community Bible Church where Steven Fournier was pastor. Children were transported to these meetings by either a bus provided by MCS, or privately by parents. After MCS decided to no longer provide transportation, plaintiffs sought use of MCS's facilities to hold their meetings. On September 22, 1996, plaintiffs submitted a formal request to use the MCS cafeteria from 3 p.m. to 4 p.m. to conduct its weekly meetings. On October 3, 1996, plaintiffs' request was formally denied in a letter by Superintendent Robert McGruder ("McGruder") on the grounds that the Milford Central School District (the "District") believed that the Club's activities constituted religious worship and instruction, which is prohibited under section 414 of the New York Education Law n2 and MCS policy. n3

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n2 Section 414 provides for the use of schools and school grounds. It also authorizes local school boards to adopt reasonable regulations for the use of school facilities. Section 414 states that school boards may permit the use of the schoolhouse or school grounds for, *inter alia*, the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

* * *

(c) For holding social, civic and recreational meetings

and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination. . . .

n3 In his October 3, 1996 letter, Superintendent McGruder stated:

> Your group's request to use the school facilities indicated such use would be for the purpose of 'hearing a bible lesson and memorizing scripture.' I understand such proposed use to be the equivalent of religious worship, which is prohibited under [Milford Central School District] policy, rather than the expression of religious views or values on a secular subject matter. To my knowledge, our facilities have not been used in the past by any organization for the purpose of religious worship.

Def. Ex. A, Letter of Robert McGruder, Interim Superintendent, Milford School District, dated October 3, 1996.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - -

Pursuant to section 414, the MCS District Board of Education adopted the "Community Use of School Facilities Policy" ("Community Use Policy") on August 26,

1992. See Def. Ex. 3. The Community Use Policy provides that school facilities may be used by district residents for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public" and consistent with all applicable state laws. Id. The policy further provides that such use must be for nonreligious purposes:

> School premises shall not be used by any individual or organization for religious purposes. Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Id. at 1.

The Community Use Policy lists acceptable and prohibited uses for school facilities, essentially iterating the acceptable and non-acceptable uses provided in New York Education Law § 414. See *supra* note 1.

B. Procedural History

Plaintiffs filed their Complaint on March 7, 1997. The Complaint contains claims under 42 U.S.C. § 1983 for violations of the plaintiffs' free speech rights under the First Amendment and equal protection rights under the Fourteenth Amendment; and a claim under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb et seq. n4 Plaintiffs sought injunctive relief, damages, and attorneys' fees.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n4 RFRA has been declared unconstitutional by the United States Supreme Court. See City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157, 2172 (1997). Accordingly, plaintiffs' RFRA claim is moot. See Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 217 (2d Cir. 1997), cert. denied, U.S. , 140 L. Ed. 2d 670, 118 S. Ct. 1517 (1998).

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

Plaintiffs moved for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a), restraining and enjoining defendants from enforcing a ban on plaintiffs' First Amendment right to utilize the school facilities that have, by policy and practice, been made available for public use to other organizations during non-school hours. This Court granted the motion in a bench decision rendered April 14, 1997. Citing to the holdings in Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), and Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995), this Court noted

> There is no question that the defendant can limit the use of its facilities, and that it need not permit even those uses provided for in § 414 of New York Education Law. However, once it established itself as a limited forum by permitting certain categories of outside uses of its facilities, the State, in the person of the defendant, must respect the lawful boundaries it has itself set.

April 14, 1997 Bench Decision (internal citations omitted). With respect to the question of whether plaintiffs met their burden to show sufficiently serious questions going to the merits to present a fair ground for

litigation, this Court ruled

> In the instant case, the central dispute relates to each sides' understanding of the plaintiff [Good News Club's] meetings. Is the content religious, as alleged by the defendant? Or is the content non-religious, but presented from a religious viewpoint, as alleged by the plaintiffs? . . . . Clearly, this issue presents fair ground for litigation, as it can only be resolved after 'full and complete proof of the nature' of [Good News Club's] programming.

Id. (internal citations omitted).

Defendant now moves for summary judgment dismissing the Complaint. Plaintiffs cross-move for summary judgment on their free speech and equal protection claims. n5

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - -

n5 On September 28, 1998, the parties filed a Joint Stipulation to Remove the Case From the Trial Calendar pending resolution of defendant's motion and plaintiffs' cross-motion for summary judgment.

- - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - -

II. DISCUSSION

A. The Standard for Summary Judgment

The Court will now address defendant's motion for summary judgment.

The standard for summary judgment is well-settled. Under Fed. R. Civ. P. 56(c), if there is "no genuine issue

as to any material fact . . . the moving party is entitled to a judgment as a matter of law . . . where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); see also Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81, 86 (1996). The moving party bears the initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting FED. R. CIV. P. 56(c)). The initial burden is to demonstrate "that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has met its burden, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. See Celotex Corp., 477 U.S. at 322; Matsushita, 475 U.S. at 585-86. A dispute regarding a material fact is genuine if a reasonable jury could return a verdict for the non-moving party; that is, whether the non-movant's case, if proved at trial, would be sufficient to survive a motion for judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). When reasonable minds, however, could not differ as to the import of the evidence, then summary judgment is proper. Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 116 L. Ed. 2d 117, 112 S. Ct. 152 (1991).

Although the trial court must resolve all ambiguities and draw all inferences in favor of that party against whom summary judgment is sought, Ramseur v. Chase

Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985) cert. denied, 484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987), the motion will not be defeated by a non-movant who raises merely a "metaphysical doubt" concerning the facts or who only offers conjecture or surmise. Delaware & H.R. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir.1990), cert. denied, 500 U.S. 928, 114 L. Ed. 2d 125, 111 S. Ct. 2041 (1991) (quoting Matsushita, 475 U.S. at 586); see also Western World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990). Indeed, the nonmoving party's opposition may not rest on mere allegations or denials of the moving party's pleading, but "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e).

It is with these considerations in mind that the Court addresses defendant's motion for summary judgment.

B. The Freedom of Speech Claim

1. Nature of the Forum

The protections afforded by the First Amendment do not guarantee unlimited access to public property. A school district, like any other property owner, may regulate access to property under its control. See Lamb's Chapel, 508 U.S. at 390; Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). In determining the extent to which the government may limit access to its property, the Supreme Court has adopted a forum analysis that balances the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity. See Cornelius, 473 U.S. at 800; Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 691 (2d Cir. 1991). Accordingly, the right

of access to public property depends upon the character of the property at issue. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983); Bronx Household, 127 F.3d at 211 ("Freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered."). To this end, the Supreme Court has characterized public property for First Amendment purposes in three ways: (1) the traditional public forum; (2) the designated or limited public forum; and (3) the nonpublic forum. See Cornelius, 473 U.S. at 802; Bronx Household, 127 F.3d at 211.

The Court's first task is to determine the nature of the forum created by the District in MCS's facilities. This requires an examination of the state law and the school policies governing permitted uses of school facilities and whether the District previously opened its property "to entities of a similar character and for the discussion of topics of similar nature." Travis v. Owego-Apalachin Sch. Dist., 1990 U.S. Dist. LEXIS 8492, *17, 1990 WL 94196, at *6 (N.D.N.Y. July 6, 1990) (McAvoy, J.), aff'd, 927 F.2d 688 (2d Cir. 1991).

Generally, courts analyze the State's intent in creating the forum in determining which type of forum exists. See Cornelius, 473 U.S. at 805; Deeper Life Christian Fellowship, Inc. v. Board of Educ. of the City of New York, 852 F.2d 676, 680 (2d Cir. 1988) ("Critical to a finding that the State has created a limited public forum is a determination of the State's intent in establishing the forum.") (citations omitted). New York Education Law § 414 evidences the intent of the legislature to create a limited public forum in its public schools by permitting use of public school buildings by the general public for specific purposes. See NEW YORK EDUC. LAW § 414 (McKinney 1988 & Supp. 1998); see also Deeper Life, 852 F.2d at 680; Travis, 1990 U.S. Dist. LEXIS 8492,

*10, 1990 WL 94196, at *4. Notably, religious worship, instruction, and fundraising is not among these enumerated purposes. See Deeper Life, 852 F.2d at 680 (citing Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (4th Dep't 1978)). Moreover, the Community Use Policy prohibits use of school facilities for "religious purposes." In denying plaintiff's request to use the school cafeteria, Superintendent McGruder stated

> Your group's request to use the school facilities indicated such use would be for the purpose of 'hearing a bible lesson and memorizing scripture.' I understand such proposed use to be the equivalent of religious worship, which is prohibited under [Milford Central School District] policy, rather than the expression of religious views or values on a secular subject. To my knowledge, our facilities have not been used in the past by any organization for the purpose of religious worship.

Def. Ex. A, Letter of Robert McGruder, Interim Superintendent, Milford School District, dated October 3, 1996.

In adopting the Community Use Policy, the District carefully attempted to comply with the requirements in section 414 and the holding in Lamb's Chapel. Thus, "nothing in [the District's] 'official' policies evinces the intent to designate [its] facilities as limited public forums for religious purposes." Liberty Christian Ctr. v. Board of Educ. of the City Sch. Dist. of the City of Watertown, 8 F. Supp. 2d 176, 183 (N.D.N.Y. 1998) (McAvoy, C.J.). While the District's official policies tend to favor a finding of a limited public forum, the "past practice of the [District] in regard to its use of the property at issue [also] is a proper consideration" in determining the type

of forum created. Deeper Life, 852 F.2d at 680; see also Perry, 460 U.S. at 47.

In the present case, the parties agree that MCS is a limited public forum. See Pl. Mem. of Law at 7; Def. Mem. of Law at 7-8, 12. "Limited public forums are 'created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" Bronx Household, 127 F.3d at 211 (quoting Cornelius, 473 U.S. at 802). When a state opens a forum to the general public, the state is "bound by the same standards as apply in a traditional public forum." Perry, 460 U.S. at 46. Accordingly, while the First Amendment permits reasonable time, place, and manner regulations, it forbids the state to enforce content-based exclusions unless narrowly drawn to serve a compelling state interest. See id.; Travis, 927 F.2d at 692.

The State "is not required to indefinitely retain the open character" of a limited public forum, however, Perry, 460 U.S. at 46, and an entity such as a school district is entitled, as is a private owner of property, to "preserve the property under its control for the use to which it is dedicated." Lamb's Chapel, 508 U.S. at 390. A state may therefore designate a forum as public "but limit[] the expressive activity to certain kinds of speakers or to the discussion of certain subjects." Travis, 927 F.2d at 692; see also Rosenberger, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created justify the State in reserving it for certain groups or for the discussion of certain topics."); Perry, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access based on the basis of the subject matter and speaker identity."). Such content-based limitations are permissible to the extent that they

preserve the purposes of the limited forum and are viewpoint neutral. Rosenberger, 515 U.S. at 829-30; Lamb's Chapel, 508 U.S. at 393; Bronx Household, 127 F.3d at 211 ("Restrictions on access based on speaker identity and subject matter are permissible only if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'") (quoting Cornelius, 473 U.S. at 806).

As to those specified uses for which such property is designated a public forum, the same First Amendment protections accorded traditional public forums apply. See Perry, 460 U.S. at 46; Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986). In other words, constitutional protection in a limited public forum is afforded only to "expressive activity of a genre similar to those that government has admitted to the limited public forum." Travis, 927 F.2d at 692 ("The government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."). Therefore, to succeed, plaintiffs must establish that the District's use policies "created a limited public forum intended to benefit . . . organizations such as [Good News] and encompassing the purposes for which the organization seeks to use the school property," Deeper Life, 852 F.2d at 680, and permitted similar organizations to use the school facilities for similar purposes. See Bronx Household, 127 F.3d at 214.

2. Reasonable and Viewpoint Neutral

Where the state has created a limited public forum by permitting access to designated groups, the First Amendment protections afforded to a traditional public forum apply and "the constitutional right of access would . . . extend only to other entities of similar

character." Perry, 460 U.S. at 48; see also Rosenberger, 515 U.S. at 829 ("Once it has opened a limited forum . . . the State must respect the lawful boundaries it has itself set."); Travis, 927 F.2d at 692 ("Constitutional protection is afforded only to expressive activity of a genre similar to those that the government has admitted to the limited forum."). However, where the speech in question addresses a subject not encompassed within the purpose of the forum, it may be excluded from the forum provided it does not discriminate against speech on the basis of its viewpoint. See Rosenberger, 515 U.S. at 829; Cornelius, 473 U.S. at 806. Therefore, having identified the District's facilities as a limited public forum, the Court must determine whether denying Good News use of the school's facilities was reasonable and viewpoint neutral. See Bronx Household, 127 F.3d at 214; Travis, 927 F.2d at 692.

Plaintiffs do not object to the reasonableness of the District's policy that prohibits the use of MCS's facilities for religious purposes. See Bronx Household, 127 F.3d at 214 (noting that it is reasonable for a school to adopt legislation that denies groups permission to use school facilities for religious purposes). Rather, plaintiffs argue that the Club's activities are secular in nature and similar to other youth organizations, such as the Boy's Scouts, Girl's Scouts, and 4-H Club, that have been permitted to use MCS's facilities; the only difference being that Good News conveys its message "from a Christian perspective by using Bible stories, games, scripture, and religious songs." Pl. Mem. of Law at 8. Accordingly, plaintiffs contend that defendant's policies and practices have created a limited public forum open to a genre of speech that addresses "the moral development of young people." Id. at 7. Defendant, however, argues that the Club's activities are more appropriately classified as religious instruction and worship and are therefore outside the permitted use of

the forum. Plaintiffs, in turn, challenge the defendant's characterization of the Club's activities, arguing that its use falls within the same genre as the other clubs and that defendant's denial of the Club's request constituted viewpoint discrimination, and was therefore unconstitutional. Thus, the Court is faced with two tasks: (i) defining Good News' purpose and the genre of its speech; and (ii) determining whether the District permitted groups of a similar genre to use its facilities in the past.

i. What is the genre of Good News' activities?

Because the parties fundamentally disagree on the genre of the Club's speech, and such a characterization is central to the Court's determination, a detailed discussion of the Club's activities is warranted.

A careful analysis of the Club's activities reveals that its subject matter is decidedly religious in nature, and not merely a discussion of secular matters from a religious perspective that is otherwise permitted under the District's use policies. A typical Club meeting includes an opening prayer, singing of Christian songs, memorization and recital of Biblical verses and scripture for which the children receive prizes, a discussion based on a Bible reading, and a closing prayer. Dep. of Steven Fournier, at 78. Indeed, plaintiffs own description of the Club's activities is characteristic of a classroom-type setting with formal instruction:

> The Club opens its session with Ms. [Darleen] Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains

> how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Def. Ex. D, Letter of Thomas Marcelle, dated January 17, 1997.

The Good News Club is comprised of approximately twenty children, ranging from kindergarten to junior high school students. Plaintiffs argue that the Club differs from other children's organizations in that it teaches morals and values from a Christian perspective. See Dep. of Steven Fournier, at 13. Steven Fournier, the Club's teacher, describes Good News' activities as "religious in nature," but distinct from religious worship. See id. at 67. He goes on to describe the Club's activities as

> [Of] a religious nature [in] that religion is, you know, just an acceptance of a set of standards, of a set of beliefs. . . . [The Club] teaches moral values from a Christian perspective . . . [made] meaningful . . . [by] the fact that you need a relationship with Christ to fulfill [these values] the way God would have you fulfill them.

Id. at 69.

Central to this "perspective" is the children's acceptance of Jesus Christ into their lives. See Dep. of Steven Fournier, at 32 (defining the "Christian perspective" as "accepting Jesus Christ as their Savior"); Dep. of Darleen Fournier, at 136 ("Christian perspective is that you need the Lord Jesus to help you to be able to give you the power actually to live a moral life."). This message is conveyed to the children during their lesson:

> Because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ, [that is] to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who have somehow hurt you.

Dep. of Steven Fournier, at 34 (emphasis added).

Notably, the name of the club is derived from the Bible, "where the 'good news' [was] that Christ, according to the Scriptures, died for our sins, was buried and on the third day rose again." Id. at 24-25.

Each Good News Club has a teacher and formal lesson materials which are used to instruct the Club members. For example, each teacher is provided with a booklet called The Daily Bread n6 which is provided to the children, and contains excerpts from the Bible that are part of the reading materials used to instruct the children. See Dep. of Steven Fournier, at 111. An examination of one such Daily Bread booklet, entitled Marantha ("Our Lord is Coming"), is instructive of the Club's purpose. In this particular booklet, Marantha is the "password," and each section of the lesson conveys a message tied to a key word or phrase found in the Bible. During this lesson, children are instructed that

> The Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him. . . . If you have received the Lord Jesus as your Saviour from sin,

you belong to God's special group-His family. . . . After the Lord Jesus grew to be a man, He told people He would die and rise again. When He was nailed to a cross where He died, many people did not understand how He could be the Saviour. . . . Suddenly He rose up into the air and disappeared! . . . Ever since that time, those who have received the Lord Jesus have been looking for Him. Have you received Him as your Saviour? Are you looking for Him? . . . There is room for every one in [Heaven] who receives the Lord Jesus as Saviour from sin. Have you received Him? Are you looking forward to moving to the Father's house in Heaven? . . . How wonderful it will be to be with the Lord Jesus forever. . . . As you study God's Word, He will show you things He wants you to do in living your life pleasing to Him. Ask Him to show you something you can do for Him today. . . . If you obey God, you'll not be ashamed when the Lord Jesus comes. . . . Remember our mystery word . . . resurrection. Just as the Lord Jesus rose again from the dead, those who believe in Him will also be raised from their graves. If you should die before the Lord Jesus comes again, your body will be placed in a grave. But when he gives the signal, your body will be raised from the grave; it will be changed into a body like that of the Lord Jesus; and you will be caught up to meet Him in the air. . . . You will be with Him. . . . Someday, if the Lord Jesus does not come . . . you will die. . . . Our bodies will be placed in graves. When the Lord Jesus gives the signal, all the believers who have died will be raised, alive again. They will have new bodies. . . . Those who are still living will also be given new bodies like the body of the Lord Jesus so that we may travel with Him. . . . Our new bodies will be just like Jesus' resurrection body.

. . . The best thing about Heaven is that we will be with Lord Jesus forever. . . . Someday the Lord Jesus is going to judge all things you have done. He will decide if you have earned any rewards. The place where the Lord Jesus will do this is called the judgment seat of Christ. Every believer will have to appear before the judgment seat of Christ to give an account. . . . If we do what pleases the Lord Jesus, we will receive an honor . . . . When you tell someone of the Lord Jesus and he receives Him as Saviour from sin, both of you are made glad. If a person does not receive the Lord Jesus as Saviour, he will not be able to go to Heaven. Marantha ("Our Lord is Coming") would not be a happy saying for him. . . . You can encourage other boys and girls to go to Sunday school or Good News Club.

Def. Ex. E (Excerpts from Daily Bread For Boys and Girls No. 8, Marantha) (emphasis added).

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n6 This is described as a "devotional booklet" intended to provide daily "spiritual nourishment" to the children. Dep. of Steven Fournier, at 107, 08. The phrase itself "appears in the Lord's Prayer." Id. at 108.

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The theme of the lesson presented by the teacher is also characteristic of religious instruction. For example, concepts such as temptation, obedience, jealousy, and punishment are explained to the children by relating them to specific passages and verses in the Bible, and encouraging the children to "believe in the Lord Jesus as their Savior." Dep. of Steven Fournier at 90. The lesson

materials have "symbols" in the margins that emphasize "God's solution/way," and an "invitation to receive Christ," and instruct the teacher

> [To] lead a child to Christ. . . . Reading the verse from your Bible helps establish that it is God's Word. . . . Encourage children to bring their own Bibles. If many children have their Bibles, take time to help them look up their verse. . . . Invite children to receive the Lord Jesus . . . . Whenever possible, help children to feel comfortable with God's Word . . . . Encourage children to read a few verses from the Bible each day. . . . Emphasize that this verse is from the Bible, God's Word. This verse is important-and true-because God said it. . . . Be sure to give an opportunity for the "unsaved" children in your class to respond to the Gospel. Don't neglect this responsibility.

Def. Ex. 8 (excerpts from teaching lessons).

During the lesson, the teacher "challenges" the "saved" children, those who already believe in the Lord Jesus as their Savior, to "stop and ask God for the strength and the 'want' . . . to obey Him. Def. Ex. 8. The children are then instructed

> If you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will--we will pray with you separately, individually. . . . And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him.

Dep. of Steven Fournier, at 86-87; 94; see also Def. Ex. 8 ("Challenge" section in excerpted teaching materials).

If a child is "unsaved," the teacher "invites" the child to "to trust the Lord Jesus to be your Savior from sin" and "receive[] [him] as your Savior from sin." Def. Ex. 8. The children are then instructed

> If you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life.

See Def. Ex. 8 ("Invitation" section in excerpted teaching materials).

> And then we would give an invitation that if you would like that strength to obey God and you would like to ask Jesus as your personal Lord and Savior, come up and talk with us . . . and we'll pray with you. . . . And also the invitation would be if these children, if they don't know the Lord as their Savior, in order to overcome jealousy or to obey God or whatever value we're speaking of, they would need to ask Jesus into their lives.

Dep. of Steven Fournier, at 90-91.

The "challenge" and "invitation" occur at various times throughout the lesson. See id. at 98. During the lesson, the teacher emphasizes the importance of memorizing Biblical verses by awarding the children prizes or candy for correctly reciting the assigned verse. See Dep. of Steven Fournier, at 25, 39. The children are taught new

verses each week, and are assisted by their teacher in memorizing the verse by "playing a game that helps them to remember that verse, sort of like a drill." Id. Additionally, the children are provided with copies of "memory verse tokens" that contain scripture verses that the children are asked to memorize for the following week's lesson. See id. at 102; 107. Praying is also a regular part of each Club meeting. During these prayers, the children "may at times [pray] . . . to receive Jesus as their personal Savior." Id. at 23. The children are also read "missionary stories" n7 that "spread the gospel" and encourage Bible study. Id. at 38. During these stories there are occasional references to accepting Jesus Christ as the Savior. See id. at 33-34. The children regularly sing songs of a religious nature that make references to God or Jesus Christ. n8 See id. at 34. Notably, none of the children have declined to participate in any of the Club's activities. See id. at 28.

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n7
Although this phrase is not clearly defined by the parties, the stories discuss "some part of the world where missionary activity is going on." Dep. of Steven Fournier, at 26. Therefore, these stories likely deal with "person[s] sent by a church . . . into a newly settled region . . . to carry on evangelism." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 917 (1979).
Notably, Steven Fournier, the Club's teacher, and pastor of the Milford Center Community Bible Church, is a "village missionary" who provides "full-time pastoral leadership to small churches in rural area." Id. at 8-9. Prior to his current position, Mr. Fournier was pastor of Montville Union Baptist Church. See id. at 8.

n8 For example, the lyrics to one song, "You and Me,"

are

> You and me-you and me, Jesus dies on the cross for you and me. You and me-you and me, Jesus rose from the dead for you and me. You and me-you and me, He is coming back for you and me.

Def. Ex. 8 (excerpted from Club teaching materials).

In other lyrics to Club songs, the children are told

> He is Lord . . . He is risen from the dead and He is Lord. Every knee shall bow, every tongue confess, that Jesus Christ is Lord.

Id.

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The Club's activities are characteristic of formal religious instruction, structured in a classroom setting. Each Club has a teacher, uniform lesson plans, and teaching materials. See id. at 84-88. That the Club does not promote any one specific denomination or theology within the Christian faith does not make its activities any less religious in nature. Good News' teaching materials and lessons are oriented toward instilling Christian beliefs in the children. To this end, the children pray, read the Bible, memorize Biblical verses, and sing songs that have religious references. These activities "clearly denote the organization as a religious club," designed to "instill Christian religion and values" in the children. Good News/Good Sports Club v. School District of the City of Ladue, 28 F.3d 1501, 1511-12 (8th Cir. 1994) (Bright, J., dissenting), cert. denied, 515 U.S. 1173, 132 L. Ed. 2d 878, 115 S. Ct. 2640 (1995). The emphasis on prayer, memorization, and recitation of

Biblical verses and scripture, and singing of religious songs also are characteristic of worship activities that inculcate Christian religion and values in the children. See Bronx Household, 127 F.3d at 215 (plaintiff describes its proposed church worship services to include "hymn singing . . . Bible reading, Bible preaching, and teaching").

The purpose of Good News is to "pass along Christian faith and morality to the student members of the Club." Good News/Good Sports Club, 859 F. Supp. 1239, 1248 (E.D. Mo. 1993), rev'd, 28 F.3d 1501 (8th Cir. 1994), cert. denied, 515 U.S. 1173, 132 L. Ed. 2d 878, 115 S. Ct. 2640 (1995). The common theme emphasized in each lesson is the importance of having "a relationship with Christ." Dep. of Steven Fournier, at 69. Specifically, the children are "invited" to accept Jesus Christ in their lives or "challenged" to follow God's Word if they already believe in Jesus Christ as their Savior. See id. at 96-100. Accordingly, the Club uses formal religious instruction and prayer to "instill and reinforce Christian faith" in the children. Good News/Good Sports Club, 859 F. Supp. at 1248.

Having defined the genre of Good News' activities as religious instruction, the Court must now examine whether MCS permitted similar organizations of a similar genre to use the school's facilities in the past.

ii. Did the District permit prior use by groups of a similar genre?

The 1992 Community Use Policy created a limited public forum in the District's school facilities. In this regard, the District adopted a neutral policy toward all community groups that does not permit the use of school facilities for religious purposes. The policy is not anti-religious; it is intended to prohibit all outside

groups from using District facilities for religious purposes. As previously noted, "religious purposes" is not included in the enumerated purposes for which a school may be used under N.Y. State Education Law § 414. See Trietley, 409 N.Y.S.2d at 915. The Second Circuit has held this construction of the statute as binding "in the absence of 'other persuasive data that the highest court of the state would decide otherwise.'" Deeper Life Christian Fellowship, Inc. v. Sobol, 948 F.2d 79, 83-84 (2d Cir. 1991). "The provision of religious worship, instruction, and fundraising is not among [the enumerated] purposes." Deeper Life, 852 F.2d at 680; see also Bronx Household, 127 F.3d at 210 (dealing with school policy where "no outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school."). This was the same view adopted by MCS. See Dep. of Peter Livshin, Superintendent of Milford Central School, at 7 ("I would interpret [religious purposes] to mean conducting religious services, providing religious instruction or to an extreme, religious indoctrination into a philosophy or a belief."); see also Def. Ex. A, Letter of Robert McGruder, Interim Superintendent of Milford Central School. The District's policy of denying the use of school facilities for "religious purposes" encompasses religious instruction and prayer in its prohibition. Accord Deeper Life, 852 F.2d at 680. Therefore, Good News' proposed use was not for purposes otherwise permitted under the District's Community Use Policy. See Lamb's Chapel, 508 U.S. at 393-94. Furthermore, plaintiffs have not argued nor presented any evidence that the District previously permitted the use of its facilities for religious purposes. Cf. Bronx Household, 127 F.3d at 214. Rather, plaintiffs contend that, because access to MCS's facilities was granted to the Boy Scouts, Girl Scouts, and 4-H Club, Good News must be granted similar access because it deals with the same subject matter--teaching children moral values, but from a

different viewpoint--the Christian perspective.

A comparison of the activities between Good News and the Boys Scouts, Girl Scouts, and 4-H Club, reveals that Good News' activities constitute religious instruction that is conceptually of a different genre than the secular subject matter dealt with by these other clubs. In failing to make this distinction, plaintiffs misunderstand that while a limited forum may be open to certain groups, it may be permissibly closed to other groups whose activities focus on a different subject matter. See Perry, 460 U.S. at 48 ("While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as [Perry Local Educators' Association], which is concerned with the terms and conditions of teacher employment."). An examination of the Boy Scouts, Girl Scouts, and 4-H Club supports this conclusion.

The Boy Scouts is designed to provide "effective character, citizenship, and personal fitness training" for children. Def. Ex. 4 (excerpt from Boy Scouts Web Site). Through a merit system, they encourage children to be "physically, mentally, and emotionally fit"; "a high degree of self reliance"; and to "understand the principles of the American social, economic, and governmental systems." Id. To accomplish these goals, the Boy Scouts "focuses on a vigorous program of outdoor activities" where "Scouts share responsibilities and learn to live with one another" and "learn ecology and practice conservation of nature's resources." Id. While the Boy Scouts teach reverence and a duty to God, it is only a part of its overall purpose which is the personal growth and development of leadership skills. See Good News/Good Sports Club, 859 F. Supp. at 1248 ("Any incidental

reference to God . . . does not convert the secular nature of the [Boy] Scouts into a religious nature.").

The purpose of the Girl Scouts "is to inspire girls with the highest ideals of character, conduct, patriotism, and service [so] that they may become happy and resourceful citizens." Def. Ex. 5 (excerpt from Girl Scout Web Site). The Girl Scouts are "based on ethical values . . . working in partnership with adult volunteers. Its sole purpose is to meet the special needs of girls." Id. The 4-H Club is a youth organization whose purpose is to "enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." Def. Ex. 6 (excerpts from Cornell University Cooperative Extension 4-H Youth Development system). Similar to the Boy and Girl Scouts, the 4-H Club strives to develop leadership and volunteer skills in the children and values cultural diversity in its membership.

The Club's teacher, Steven Fournier, acknowledged that the Boy and Girl Scouts do not instruct children in religious subjects. See Dep. of Steven Fournier, at 116. Although the Boy Scout members are awarded a badge for "God and Country," the instruction and activities necessary to receive the badge are performed outside the scout meetings, privately by the child and his family. See Good News/Good Sports Club, 859 F. Supp. at 1247; see also Dep. of Steven Fournier, at 114-15.

The Court finds instructive the findings of the district court in Good News/Good Sports Club, in which the district court, following a bench trial, returned a judgment in favor of the defendant. Specifically, the district court found

> The evidence presented at trial supports a finding that the [Girl, Boy, Cub, Tiger Cub, and Brownies] Scouts are primarily a secular

organization engaging in secular activities. The purpose of Scout meetings is for the young persons involved to have fun, to support the ideals of Scouting, education, and reinforcement of moral values. Although Scouts may earn religious badges, those badges are earned at home or in the scout's place of worship.

Scouting activities include camping, woodworking, swimming, non-religious games, and other secular, skill-oriented activity. Other than the single reference to God in the Scout oath, all activity at Scout meetings is of a secular nature. . . . The descriptions of the purpose of Scouting do not include any reference to God or to religion.

> The [Good News] Club, by contrast, was initiated to teach the young members Christian values. Each parent who testified at trial testified to the importance of the religious aspect of the Club and that a purpose of the Club was to pass along Christian faith and morality to the student members of the Club. A typical Club meeting consists of an opening prayer, snack, activity, Bible lesson, and closing prayer. Plaintiff . . . testified in his deposition that he liked the Club because it gave him the opportunity to relate to Christian friends and that it was important to keep the Club going so that others might become Christian.

859 F. Supp. at 1247-48 (citations omitted).

The district court then distinguished the respective nature of the childrens' organizations as follows:

> Although both the [Good News] Club and the Scouting program are concerned with the moral development of youth, the Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values in its members. The Scouts, by contrast, are a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith. Any incidental reference to God or the "Great Master" does not convert the secular nature of the Scouts into a religious nature. The Court, therefore, finds that the [Good News] Club and the Scouts are not of similar nature.

Id. at 1248 (citations omitted). This Court agrees that Good News, as a religious club, is not similarly situated with these other children's organizations that are primarily secular in nature. See Trinity United Methodist Parish v. Board of Educ. of the City of New York, 907 F. Supp. 707, 714 (S.D.N.Y. 1995); Good News/Good Sports Club, 859 F. Supp. at 1248.

Plaintiffs rely heavily on the Supreme Court's holding in Lamb's Chapel to argue that the District's denial of the Club's request to hold their meetings at MCS constituted viewpoint discrimination. However, the facts in Lamb's Chapel are distinguishable from the present case. Accord Good News/Good Sport Club, 28 F.3d at 1511 (Bright, J., dissenting).

In Lamb's Chapel, the Supreme Court held that a church was impermissibly denied access to school facilities to present "a film series dealing with family and child-rearing issues faced by parents today." Lamb's Chapel, 508 U.S. at 387. The film series discussed the views of a licensed psychologist and clinical professor of pediatrics on "the undermining influences of the media that could be counterbalanced by returning to

traditional Christian family values." n9 Id. at 388. In holding that plaintiff was impermissibly denied use of the school district's facilities, the Court noted

> The critical question [is] whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

Id. at 393.

----------Footnotes----------

n9 The series presented six films titled, "A Father Looks Back"; "Power in Parenting: The Young Child"; "Power in Parenting: The Adolescent"; "The Family Under Fire"; "Overcoming a Painful Childhood"; and "The Heritage." Lamb's Chapel, 508 U.S. at 389 n.3. These films examine the family unit and the use of traditional values to strengthen parent-child relationships. See id.

----------End Footnotes----------

The Court then held

> The film series involved here no doubt dealt with a subject otherwise permissible under [the school use policies] and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.

Id. at 394.

Here, in contrast, Good News is a religious youth organization whose proposed use deals specifically with religious subject matter--and not, as plaintiffs contend,

merely a religious perspective on secular subject matter. Thus, Good News' proposed use and religious subject matter place it in a different genre than the Boy Scouts, Girl Scouts, and 4-H Club. There is considerable difference between the formal religious instruction and prayer offered by Good News and a film series which focuses on strengthening family relationships. While the Club is concerned with developing the moral values of its members, the dominant theme of a Good News meeting is religious instruction and prayer. Thus, the Club's proposed use is not sufficiently similar to the prior uses of MCS's facilities permitted by the District. The District's prohibition was based on the general subject matter--religious instruction and prayer, and not on a particular perspective or viewpoint on a subject otherwise within the forum's limitations. See Rosenberger, 515 U.S. at 830; Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1279 (10th Cir.), cert. denied, 519 U.S. 949, 136 L. Ed. 2d 251, 117 S. Ct. 360 (1996). Accordingly, the District's denial of Good News' request to use MCS's facilities was consistent with its prior practice and use and thus constitutionally sound. Because the Court finds that defendant has not violated the plaintiffs' First Amendment right of free speech, it need not consider whether the defendant's actions were necessary to comply with the constitutional prohibition against state establishment of religion. See Rosenberger, 115 S. Ct. at 2520; Church on the Rock, 84 F.3d at 1280.

C. The Equal Protection Claim

Under the Equal Protection Clause, "a governmental entity may not 'legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. . . . All persons similarly circumstanced shall be treated alike.'" Trinity United

Methodist Parish, 907 F. Supp. at 719 (quoting Reed v. Reed, 404 U.S. 71, 75-76, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971) (citations omitted)). However, "there is no fundamental right of freedom of speech in a limited forum from which various types of speakers and subjects are properly excluded." Bronx Household, 127 F.3d at 217.

In the present case, the District has permissibly made a distinction between clubs whose purpose and subject matter are substantially dissimilar in nature. The District's Community Use Policy is consistent with New York Education Law § 414, and recognizes that it may properly exclude clubs with a religious purpose provided such exclusion is reasonable and viewpoint neutral. See Lamb's Chapel, 508 U.S. at 393. As previously discussed, Good News conducts religious instruction and prayer. The Club has a religious purpose -- evidenced by its focus on memorization and recital of Biblical verses, singing of religious songs, Bible reading, and prayer. This places the Club in a different genre than the Boy Scouts, Girl Scouts, and 4-H Club. Accordingly, the District's Community Use Policy as applied, did not deny the plaintiffs equal protection of the law. Accord Trinity United Methodist Parish, 907 F. Supp. at 719.

III. CONCLUSION:

For all of the foregoing reasons, it is hereby **ORDERED,**

that the preliminary injunction is **VACATED**, and it is further **ORDERED,**

that defendant's motion for summary judgment seeking to dismiss the Complaint is **GRANTED,** and it is further

ORDERED, that plaintiffs' cross-motion for summary

judgment is **DENIED.**

IT IS SO ORDERED.

October 23, 1998
at Binghamton, New York

Hon. Thomas J. McAvoy

Chief U.S. District Judge

Policy of the Milford Central School

Community Use of School Facilities

The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:

1. For the purpose of instruction in any branch of education, learning or the arts.

2. For public library purposes, subject to the provisions of the education law.

3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public.

4. For meetings, entertainment events and occasions where admissions fees are to be charged when the proceeds of those meetings and events are to be expended for an educational or charitable purpose. However, the use of facilities and grounds are not to be permitted if these meetings, entertainment events and other occasions are under the exclusive control and the proceeds are to be applied for the benefit of a society, association, or organization, or religious sect or denomination, or of a fraternal, secret or exclusive society or organization, other then organizations of veterans of the military, naval and marine service of the United States, and organizations of volunteer firefighters or volunteer into its workers.

5. For recreation, physical training in athletics, including competitive athletic contest of children attending a private, non-profit school.

6. For the provision of child care services during nonschool hours provided that cost of care shall not be a school district charge but shall be paid by the person or persons responsible for the support of the child. The local social services is authorized by law or by any other public or private voluntary source or any combination thereof. [sic]

7. For graduation exercises held by not for profit elementary and secondary schools provided, how ever, that no religious exercises, prayer or religious services are performed in connection in this use.

Use for Nonreligious Purpose. School premises shall not be used by any individual or organization for religious purposes. (Emphasis in original). Those individuals and or organizations wishing to use the school facilities and or grounds under this policy shall indicate on a Certificate Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

Insurance. Individuals or organizations requesting the use of school facilities and/or school grounds may need to submit a Certificate of Insurance providing personal injury and property damage coverage in an amount not less than five hundred thousand dollars ($500,000). (Emphasis in the original). The Superintendent will determine on in individual basis if a certificate is necessary.

Charges. In connection with any request to use school facilities or school grounds, except as stated herein, all organizations and individuals wishing to use school facilities or school grounds will be charged established fees for the use of such facilities or grounds, to be determined in by the Superintendent of Schools and approved by the Board of Education. Payment will be made to the superintendent of schools or his designee prior to the vacating of school property.

Use by District Residents. The Board of Education has determined that since the facilities are owned collectively by residents of the Milford Central School District, there will be no charge for the use of school facilities and grounds by District residents unless such use constitutes and added expense to the District. In such case, residents shall be required to pay for such expense. However, regardless of whether or not any fee will be charged for use of District facilities or grounds all individuals or organizations shall be required to furnish the required certificate of insurance to protect the District, as set forth in this policy, and to submit the required Use of the Facilities Request form along with the required Certificate Regarding Use of School Premises form.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302 (TJM/GLS)
Plaintiffs' Rule 7(f)
Statement

MILFORD CENTRAL SCHOOL

Pursuant to Local Rule 7.1(f), plaintiffs, with respect to their cross motion for summary judgment, maintain that the following are undisputed material facts:

1. The Good News Club (hereinafter "GNC") is anunincorporated association. S.Fournier's aff. ¶1

2. The Good News Club is a youth organization that develops children's moral values by using Bible stories, games, scripture, and songs, (Exhibit 2[1], Exhibit 3, and D.Fournier's aff. ¶6 at p.16[2]), from a Christian perspective. Plaintiffs agree with defendant's statement of undisputed facts ¶14 in that GNC's "orientation" (or perspective) is Christian. S.Fournier's aff. ¶5-7 at p-10.

3 . GNC is non-exclusive and is open to any child between the ages of 6 and 12. D.Fournier's aff. ¶9 at p.16.

4 . GNC neither requires children to be of the Christian faith nor to believe in God to become a club member. Exhibit 12 at p .27, S.Fournier's aff. ¶42, 44 at p.14.

[1] All exhibits refer to plaintiffs' exhibits unless expressly stated to the contrary.
[2] All page references referred to the page in plaintiffs'

Notice of Motion and Rule 7 Statement booklet on which the affidavit referenced appears.

5. GNC does not inquire about the religious background of the children who join or attend club meetings. Exhibit 12 at p.27, S.Fournier's aff. ¶43 at p.14.

6. Parental permission is required to attend GNC meetings. Exhibit 3 at p.2.

7. GNC is not affiliated with, sponsored by, or under the control of any church. Exhibit 12 at p-51, S.Fournier's aff.¶37 at p.14.

8. GNC neither teaches nor promotes any particular Christian sect's doctrine or theology; GNC does not instruct about the differences of theology among the Catholic sects, among the Protestant sects, or between Catholic and Protestant sects; GNC does not instruct in theology; and GNC neither teaches nor catechizes tenets of a faith. S.Fournier's aff. ¶38-40 at p.14, D.Fournier's aff. ¶ll at p.16.

9. GNC is not associated with any public school or governmental agency. D.Fournier's aff. ¶9 at p.21.

10. There are no employees of any public school or any other governmental agency who exercise authority (real or apparent) over the children. D.Fournier's aff. ¶10 at p.21.

11. For the school year 1995-6 and from September 10-16,1996, GNC held their meetings at Milford Community Church.

12. For the school year 1995-6 and from September 10-16,1996 Milford Central School bused the children

from the school to GNC meetings at the church. D.Fournier's aff. ¶5 at p.21

13. On September 16, 1996, plaintiffs were informed by Milford School transportation director, Ken Cough, that the defendant would no longer transport children to GNC meetings or activities. D.Fournier's aff. ¶6 at p.21

14. On or about September 22, 1996, GNC submitted a request to use the Milford School cafeteria every Tuesday during the School year between the hours of 3:00 p.m. to 4:00 p.m. D.Fournier's aff. ¶12 at p.16. Plaintiffs agree with defendant's statement of undisputed facts ¶2.

15. On or about September 22, 1996, defendant's superintendent denied GNC permission to use the building citing GNC's intended religious purposes. Plaintiffs agree with defendant's statement of undisputed facts ¶3.

16. Plaintiffs tried to arrange a meeting with defendant's superintendent, but were rebuffed. Exhibit 12 at p.58-64

17. In the fall of 1996, defendant's school board president offered an alternative meeting place for plaintiffs. Exhibit 12 at p.44,132-3, S.Fournier's aff. ¶18 at p.11.

18. Defendant suggested that GNC could rent a room in the "Historical Society" building and the children could walk to it after class. Exhibit 12 at p.44,132-3, S.Fournier's aff. ¶19 at p.11.

19. This offer was unacceptable because of safety concerns, insufficient funds to rent the room, and the stigma of discrimination. Fournier's aff. ¶20 at p.11

20. Defendant's policy for community use of its school facilities (Exhibit 1) took effect August 26, 1992. Exhibit 1.

21. Defendant, pursuant to its policy, has allowed the Boy Scouts, Girl Scouts, and the 4H Club to use its facilities to conduct their meetings. D.Fournier's aff. ¶17-9 at p.17; Kiser's aff ¶5-8 at p.18; Ra.Lamb's aff.¶l-4 at p.19

22. The primary purpose of these groups described in ¶21 is to teach young people proper habits and values. Exhibit 11 at p.9. See Exhibits 4-6. D.Fournier's aff. ¶17-9 at p.17; Kiser's aff ¶5-8 at p.18; R.Lamb's aff. ml-4 at p.19. Exhibit 10 at p.15-6.

23. The Boy Scouts use the school facilities to recite their oath and to conduct their meetings for the purpose of influencing a boy's character, development and spiritual growth. Exhibit 10 at p.15.

24. Defendant's superintendent has the authority to grant or deny an application for use of the defendant's school by outside community groups or individuals made pursuant to its policy. Exhibit 10 at p.6.

25. Defendant's superintendent has the authority to interpret the policy. Exhibit 10 at p.6-7.

26. Defendant's superintendent has interpreted its policy to allow a political debate between two candidates for public office. Exhibit 10 at p-9.

27. Defendant's superintendent has interpreted its policy to allow an outside group to use the school to put on a Christmas concert comprised mainly of Christian choir music and Christian songs. Exhibit 10 at p.12.

28. Defendant's superintendent has interpreted its policy to allow an outside group to show the film "The Ten Commandments." Exhibit 10 at p.13.

29. Defendant's superintendent has interpreted its policy to allow an outside group or individual to teach that human kind was created by God as literally described in the Book of Genesis. Exhibit 10 at p.19.

30. Defendant's superintendent has interpreted its policy to allow an outside group or individual to teach moral values as contained in literature like Aesop's Fables. Exhibit 10 at p.l6-7.

31. Plaintiffs do not allege any such events as describe in 826 - ¶30 have taken place on school grounds, only that such would be allowed to take place on school grounds pursuant to defendant's policy.

32. GNC requested to use the cafeteria. Exhibit 2.

33. Milford Central School building contains grades k-12. S.Fournier's aff. ¶47 at p.14.

34. Defendant assigned GNC to room 119. Id. ¶49 at p.14.

Dated: July 29, 1998

- s -

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

Plaintiffs,

STATEMENT PURSUANT TO RULE 7(f)

v.

Civil Action No.: 97-CV-0302 (TJM/GLS)

MILFORD CENTRAL SCHOOL,

Defendants.

The Defendant, Milford Central School District, by its attorneys, Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., as and for its Statement Pursuant to Rule 7(f) of the Rules of the Northern District of New York, allege that the following are material facts as to which there is no genuine issue:

1. The Plaintiffs are principals of a club known as "The Good News Club." They applied to use facilities of the Milford Central School District for purposes of a conducting a program in accordance with a building use request. (Miller Affidavit, Exhibit " 1")

2. In the building use request form, the Plaintiffs indicated that they would use the building for purposes of conducting a class in teaching moral values from a Christian perspective. The activity included teaching biblical verses and scripture. (Miller Affidavit, Exhibit " 1")

3. The Defendant's Superintendent denied the Plaintiffs permission to use the building for these purposes citing the Plaintiffs' intended use for religious purposes. (Exhibit "2", and Exhibits "H" and "I" thereto)

4. The record evidence in the case establishes that no other instances of religious use of the premises has been claimed or established by the Plaintiffs.

5. The Plaintiffs commenced this action alleging that the Defendant violated Plaintiffs' Constitutional right to Free Speech under the First Amendment; that the Defendant discriminated against the Plaintiffs in violation of their rights under the Equal Protection Clause; and, further, that the Defendant violated the Religious Freedom Restoration Act of 1993. Miller Aflidavit, Exhibit "4", Paragraphs "21", "23" & "25")

6. During the pre-trial discovery phase of this case, the Plaintiffs produced the materials that Plaintiffs use in presenting lessons and holding club meetings. (Miller Affidavit, Exhibit "2", and Exhibit "E" thereto and Exhibit "8")

7. The Plaintiff organization is named "The Good News Club." This name refers to the "good news" of Christ's gospel and the "good news" that salvation is available through belief in Jesus Christ. (Miller Affidavit, Exhibit "9", pgs. 24-25)

8. The Plaintiffs hold regular, weekly sessions with the student members of the Club. Meetings were held previously in a church at which Reverend Stephen Fournier was pastor. (Miller Affidavit, Exhibit "9", p. 15)

9. The Club meetings include the singing of religious songs with repeated reference to God and Jesus Christ. Students are also requested to memorize certain

scriptural verses. Students are given rewards, such as prizes, for correctly memorizing the scriptural verse. (Miller Affidavit, Exhibit "2", and Exhibit "D" thereto)

10. The lessons also include a section known as the "Challenge and Invitation." This is memorialized in the written materials from the Plaintiffs. The challenge is a challenge issued to students who have accepted Christ as their savior to continue to live their lives in accordance with the principles of Christ's teaching. The invitation is an invitation extended to those children who have not yet accepted Christ, but who are invited to do so. (Miller Affidavit, Exhibit "9") pgs. 86-87 and 94-100)

11. The Plaintiffs have conceded that only persons of Christian faith attend these sessions. No children of any other religious persuasion attend these sessions. (Miller Affidavit, Exhibit "9", pgs. 27-28)

12. During the course of the sessions, prizes are given. Many of the prizes are prizes with religious significance, such as pencils emblazoned with the logo "God Loves You." (Miller Affidavit, Exhibit "9", p. 39)

13. The Plaintiffs have also issued a prayer book known as "The Daily Bread." Contained in this book, which is distributed in the class and read in the class, are daily prayers. Students are encouraged and invited to read this book on a daily basis between the various Club meetings. (Miller Affidavit, Exhibit "9", pgs. 107-l 11)

14. The Club materials and the Club orientation is decidedly religious, Christian in orientation and teaching. (Miller Affidavit, Exhibit "8")

15. The Good News Club is an organization which is

sponsored by a Christian missionary organization named "The Child Evangelism Fellowship." (Miller Affidavit, Exhibit "9") p. 47)

16. Reverend Fournier, who teaches the classes, also has testified that he seeks to teach moral values from a Christian perspective. He has also testified that the moral values are meaningless without a belief in Christ. (Miller Affidavit, Exhibit "9", p. 34)

17. There are no issues of fact as to the above-described issues.

18.The Defendant contends that these are the material issues of fact about which there is no dispute.

Dated: July 2, 1998

FERRARA, FIORENZA, LARRISON,
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302(TJM/GLS)
Response to defendant's Rule 7(f) Statement

MILFORD CENTRAL SCHOOL

Pursuant to Local Rule 7.1(f), plaintiffs respond to defendant's allegation of undisputed facts as follows:

1. Plaintiffs do not dispute defendant's allegation in ¶1.

2. Plaintiffs do not dispute defendant's allegation in ¶2.

3. Plaintiffs do not dispute defendant's allegation in ¶3.

4. Plaintiffs do not dispute defendant's allegation in ¶4 except that the Boy Scouts have used defendant's premises. Plaintiffs' statement of undisputed facts ¶21 and Exhibit lo at p.15-6.

5. Plaintiffs do not dispute defendant's allegation in ¶5.

6. With respect to defendant's allegation in ¶6, not all the material produced in defendant's Exhibit 2 part E

and Exhibit 8 were used in presenting lessons during club meetings. Some of the materials were distributed to the children as part of the club, but not actually presented to them. In particular, GNC does not teach, read, or present the booklet entitled "Daily Bread" in Club meetings. Exhibit 12 at p.llO-111, S.Fournier's aff. ¶9 at p.11. Daily Breads are distributed to the children for personal use. Id. Material like the "David" flannel graph instructional book (Exhibit 7) are used to present a lesson to the Club. S.Fournier's aff. ¶8 at p.10

7. With respect to defendant's allegation in ¶7, Mr. Fournier's assumptions in his testimony (Exhibit 12 at p.24-5) speak for themselves.

8. Plaintiffs do not dispute defendant's allegation in ¶8, but does note that Mr. Fournier was not involved with the GNC's meetings when they were held at the church. Exhibit 12 at p.14.

9. Plaintiffs do not dispute defendant's allegation in ¶9.

10. With respect to defendant's allegation in ¶10, Mr. Fournier's testimony concerning the challenge and invitation part of the lesson speaks for itself. Exhibit 12 at p.34,91,94-101,69-70,146-7.

11. Plaintiffs dispute defendant's allegation in ¶10. Mr. Fournier testified that any child can join the Good News Club. Exhibit 12 at p.27, In 5-6. Further he testified that no one asks the children what denomination or what faith they practice. Exhibit 12 at p-27 In 7-11. When asked specifically if GNC had children of the Jewish, Muslim, or other faith, Mr. Fournier testified he did not know, not that there were not children of other faiths. Exhibit 12 at p.27 Ln 12-23, p. 28 Ln 1-4.

12. Plaintiffs do not dispute defendant's allegation in ¶12.

13. Plaintiffs do not dispute defendant's allegation in ¶13 that GNC members are invited to read "Daily Bread" booklets on a daily basis. Plaintiffs dispute that "Daily Bread" booklets are read during club meetings. GNC does not teach, read, present, or utilize the booklet entitled "Daily Bread" in Club meetings. Exhibit 12 at p.l10-111, S.Fournier's aff. ¶9 at p.11. Daily Breads are distributed to the children for personal use. Id.

14. With respect to defendant's allegation in ¶14, plaintiffs do not dispute that its viewpoint (or as defendant calls it "orientation") is Christian.

15. With respect to defendant's allegation in ¶15, plaintiffs have no basis to know if the word "missionary" describes "The Child Evangelism Fellowship" ("OF") because nothing in the record so describes CEF. Further plaintiffs' relationship with CEF is described in Exhibit 12 at p.18-21.

16. With respect to defendant's allegation in ¶16, Mr. Fournier's statement contained in Exhibit 12, p.34 speaks for itself.

17. With respect to defendant's allegation in ¶17, plaintiffs disagree with it to the extent described in the preceding paragraphs.

18. With respect to defendant's allegation in ¶18, plaintiffs disagree with it to the extent described in the preceding paragraphs.

Submitted July 29, 1998

- s -

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302 (TJM/GLS)
Affidavit

MILFORD CENTRAL SCHOOL

AFFIDAVIT OF STEVE FOURNIER

Steve Fournier, being duly sworn deposes and states as follows:

1. I have personal knowledge of the facts and circumstances that give rise to the above captioned action.

2. The Good News Club (hereinafter "GNC") is an unincorporated association.

3. There are 4,242 local Good News Club Chapters across the United States. Exhibit 9.

4. I, along with my wife Darleen, lead the GNC meetings in Milford, New York.

5. The purpose of GNC is to provide a fun setting to teach a moral value from a Christian perspective.

6. GNC teaches such moral values as: do not be jealous, be kind to everyone (even those who mistreat you), and be obedient.

7. The Christian perspective is that in order to apply these moral values one needs to rely on the strength of

God.

8. The stories like the ones in the Flannel Graph book entitled "David" (Exhibit 7) are used to present the moral value.

9. GNC neither teaches, reads, nor presents stories from "Daily Bread." Defendant's Exhibit 2 (part E attached thereto) and defendant's Exhibit 8.

10. GNC, on occasion, has shown "Veggie Tales" video tapes during club meetings.

11. For the school year 1995-6 and from September 10-16, 1996, GNC held its meetings at Milford Center Community Church.

12. I was not involved in these meetings described in ¶11.

13. For the school year 1995-6 and from September 10-16, 1996, Milford Central School bused the children from the school to GNC meetings at the church.

14. Without the bus transportation, children were unable to attend GNC meetings.

15. On or about September 22, 1996, GNC submitted a request to use the Milford School cafeteria every Tuesday during the School year between the hours of 3:00 p.m. to 4:00 p.m. Plaintiff's Exhibit 2.

16. Defendant's then superintendent Dr. McGruder denied this request.

17. My wife and I tried to arrange a meeting with Dr. McGruder, but he was unreceptive to this offer. See Exhibit 12 at p.58-64.

18. In the fall of 1996, defendant's school board president offered an alternative meeting place for plaintiffs.

19. Defendant suggested that GNC could rent a room in the "Historical Society" building and the children could walk to it after class.

20. This offer was unacceptable because of safety concerns, insufficient funds to rent the room, and the stigma of discrimination.

21. On or about February 13, 1997, defendant's counsel made an offer that GNC not use the school until the Second Circuit decided the Bronx Household of Faith appeal. Defendant's Exhibit 2 part "F" attached thereto.

22. This offer was unacceptable for the reason set forth in our counsel's reply. Defendant's Exhibit 3 part "G" attached thereto.

II. GNC meetings are not religious instruction.

23. GNC meetings are not religious instruction.

24. I am an ordained Reverend and the Pastor of Milford Center Community church.

25. I am familiar with and have taught religious instruction classes and "Sunday school."

26. The purpose of religious instruction is to teach students, in an academic environment, about church traditions, sacraments, ordinances, liturgy, and theological imperatives, in order to make them active serving members of the local church and the body of Christ.

27. Unlike religious instruction, GNC does not teach children theological imperatives of any church.

28. Unlike religious instruction, GNC does not teach children about church traditions.

29. Unlike religious instruction, GNC does not teach children about sacraments, ordinances, and the liturgy of any church.

30. Unlike religious instruction, the purpose of GNC is not to make students active serving members of the local church and the body of Christ.

31. A sample story from a GNC meeting, like the story of Saul being jealous of David and Saul throwing a spear at, but missing, David, helps illustrate the differences between religious instruction and GNC meetings.

32. In GNC, when asked why Saul missed David, I told the children it was because he was not wearing his glasses.

33. Such a response would have been inappropriate in a religious instruction class.

34. The appropriate response in a religious instruction class would have been that Saul missed David because God ordained Saul to miss David -- That is, I would have taught the theological concept that God is sovereign over all events at all times.

35. The focus of the GNC meeting described in ¶31 - ¶32 was having fun and learning how to overcome feelings of jealousy.

36. In contrast, the focus of a religious instruction

class would have been the teaching of the theological concept of God's sovereignty.

III. GNC is not associated with nor sponsored by a Church.

37. GNC is not affiliated with, sponsored by, nor under the control of any church.

38. GNC neither teaches nor promotes any particular Christian sect's doctrine or theology.

39. There is no instruction concerning the differences of theology among the Catholic sects, among the Protestant sects, or between Catholic and Protestant sects.

40. GNC neither teaches nor catechizes tenets of a faith.

41. Any child can join GNC.

42. Children are not required to be of the Christian faith.

43. GNC does not inquire about the religious background or faith of any child.

44. GNC membership is not conditioned upon belief in God.

45. GNC membership is neither conditioned upon the acceptance of any statement of faith or theology nor the performance of a religious ritual like baptism.

IV. GNC's room at Milford.

46. GNC requested to use the cafeteria at Milford Central School.

47. Milford Central School building contains the high school, junior high school, and elementary school.

48. All students use the cafeteria.

49. Defendant assigned GNC to room 119.

_____
- s -
Steve Fournier

Sworn to before me this 28th day of July, 1998

_____
- s-
Notary Public

Thomas Marcelle
Notary Public, State of New York
Originally Qualified Albany County
Commission expires May 26,2000
Regis No. 02MA6007593

Supreme Court, U.S.
FILED
JUL 20 2000
CLERK

No. 99-2036

IN THE

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLENE FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a School District, which has created a limited public forum on its premises by allowing non-religious youth organizations to use its facilities after school hours and which is empowered to place reasonable restrictions on the content of the speech occurring in its facilities, violates the First and Fourteenth Amendments by excluding a group's intended speech from its facilities on account of the content thereof (which amounts to religious instruction, worship and/or prayer) where the School District has not permitted other groups to use its facilities for similar purposes?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, the Milford Central School District, respectfully requests that this Honorable Court deny Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the Court of Appeals' decision in *Good News Club v. Milford Central School*, 202 F.3d 503 (2nd Cir. 2000), holding that Respondent may deny Petitioners the use of its facilities for holding Club meetings because Petitioners' intended use of said facilities amounts to religious instruction, worship and/or prayer. To that end, Respondent submits this Brief in Opposition to the Petition for Writ of Certiorari and the accompanying lodging containing the deposition transcript of Petitioner, Reverend Fournier.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791).

Fourteenth Amendment to the United States Constitution:

> Section 1 of the Fourteenth Amendment provides, in relevant part:
>
> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any

> person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. XIV, § 1 (1868).

New York State Education Law Section 414:

The entire text of Section 414 of the New York State Education Law is set forth in attached Appendix.

Milford Central School District Community Use of School Facilities Policy:

The entire text of the Milford Central School District's Community Use of School facilities Policy is set forth in Appendix D of the Petition.

STATEMENT OF THE CASE

Section 414 of the New York State Education Law governs the use of school buildings and grounds in New York. In August of 1992, in accordance with Education Law Section 414, the Board of Education of the Milford Central School District (hereinafter, "Respondent") adopted District Policy Number 1500 entitled "Community Use of School Facilities" (hereinafter, "Community Use Policy"). The Community Use Policy provides, in relevant part, that school facilities and grounds may be used for "the purpose of instruction in any branch of education, learning or the arts" (Section 1) and for "holding social, civic and recreational meeting and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public" (Section 3). *See* Petition, Appendix D.

The Community Use Policy also expressly prohibits the use of school premises for religious purposes. More specifically, the Policy provides that:

> *School premises shall not be used by any individual or organization for religious purposes.* Those individuals and/or organizations wishing to use school facilities and/or grounds under this policy shall indicate on a Certification Regarding Use of School Premises form provided by the District that any intended use of school premises is in accordance with this policy.

See Petition, Appendix D.

In September of 1996, Respondent received a standard Use of Facilities Request form from the Reverend and Darlene Fournier on behalf of the Good News Club (hereinafter, collectively, "Petitioners"). Petitioners' stated purpose for use of the Respondent's school building was for "singing songs, hearing a Bible lesson and memorizing scripture." This first request was followed by another on September 26, 1996.

On or about October 3, 1996, Respondent's then Superintendent, Robert C. McGruder, Ph.D., denied Petitioners' requests identifying their proposed use of school facilities as "the equivalent of religious worship rather than the expression of religious views on non-secular subject matter."

In January of 1997, Petitioners' counsel sent a letter to Respondent alleging that Respondent's denial of the use of its facilities for the teaching of Bible lessons to elementary students violated Petitioners' rights under the First and

Fourteenth Amendment to the Constitution of the United States.[1]

In response to the fore-mentioned letter, Respondent requested from Petitioners copies of written materials which would be used by Petitioners as part of their lessons, a description of their proposed activities and an indication of who would be leading and/or supervising said activities.

Petitioners provided Respondent with the following general description of their intended activities:

> The Club's activities are run by Ms. Darlene Fournier. The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse[,] the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

Petitioners also supplied Respondent with various materials it intended to distribute to children during their sessions. Those materials included, *inter alia*, an invitation to children to attend the meetings; a parental permission slip; and the "Daily Bread," a booklet used by the Good News Club for story telling. The

1. Petitioners also claimed that Respondent's denial of the use of its facilities violated their rights under the Religious Freedom Restoration Act of 1993 but that claim has since become moot in light of the fact that this Honorable Court declared the Act unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). In addition, Petitioners abandoned their former Equal Protection claims on appeal to the Second Circuit.

letter which accompanied these materials stated that the children who would be participating in the Good News Club are First through Sixth graders.

After a review of the materials submitted by Petitioners, which included, for example, various stories in the "Daily Bread" continually referencing the Lord Jesus Christ, accepting the Lord Jesus as the Savior from sin, believing in the Resurrection and in the descent of the Lord Jesus from Heaven, Respondent properly concluded that the activities proposed by Petitioners were not discussions of secular subjects such as child rearing or the development of character and morals from a religious perspective but that they were the equivalent of religious instruction, worship and/or prayer. Accordingly, Respondent denied Petitioners' request to use its facilities for these purposes.

In February of 1997, Respondent denied Petitioners' subsequent request to use Respondent's facilities during the pendency of *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997).

In March of 1997, Petitioners filed a Summons and Complaint in the United States District Court for the Northern District of New York, pursuant to 42 U.S.C. §§ 1983 and 2000BB, alleging that Respondent violated their constitutional right to free speech under the First Amendment.[2]

On or about March 14, 1997, Petitioners filed a motion for a preliminary injunction to require Respondent to allow Petitioners to use Respondent's facilities to conduct their meetings during the resolution of this matter.

2. As noted in Footnote 1, Petitioners have abandoned their previous claims under the Religious Freedom Restoration Act and the Equal Protection Clause.

In April 1997, Respondent filed its Answer to Petitioners' Complaint.

On April 14, 1997, oral argument was had on Petitioners' motion for a preliminary injunction before the Honorable Thomas J. McAvoy.

On April 17, 1997, Judge McAvoy granted Petitioners' motion permitting them to use Respondent's facilities pending the resolution of the instant matter.

In August 1998, both parties moved for summary judgment in their favor.

In September 1998, the parties stipulated to the facts of the case and agreed that the case involved only questions of law.[3]

---

3. However, it should be noted that Petitioners' improperly raised an issue for the first time while on appeal to the Second Circuit. Petitioners filed a Statement of Material Facts pursuant to Rule 7(1)(a)(3) of the Local Rules of Practice in the United States District Court for the Northern District of New York (hereinafter, "Rules of Practice"). This Statement is commonly known as a "Rule 7(f) Statement." Respondent in turn filed its own Rule 7(f) Statement controverting a major portion of the Petitioners' Rule 7(f) Statement. Petitioner then filed a second Rule 7(f) Statement contradicting Respondent's Rule 7(f) Statement. Respondents did not file a second Rule 7(f) Statement. Petitioners claimed *for the first time on appeal* that Respondent's failure to file a second Rule 7(f) Statement deemed that the facts alleged in their second Rule 7(f) Statement were deemed true. Petitioners now attempt to make this same argument to this Court.

It is well-settled that consideration of an Appeal is confined to the facts contained in the record and will consider nothing which does not appear therein. Fed. R. Civ. P. 46. Because Petitioners did not argue that Respondent "admitted" the facts contained in their second Rule 7(f) Statement at the District Court level, they were precluded from doing so on Appeal to either the Second Circuit or to this Court.

(Cont'd)

They agreed to remove the case from the trial calendar pending the outcome of the parties' respective motions for summary judgment.

On October 23, 1998, Judge McAvoy granted Respondent's summary judgment motion and denied that of Petitioners.

On October 30, 1998, Petitioners appealed Judge McAvoy's ruling to the Court of Appeals for the Second Circuit.

Oral Argument was had on Petitioners' appeal on June 23, 1999. The Second Circuit affirmed the lower Court's decision on February 3, 2000.

(Cont'd)

Even if Petitioners were not so precluded, the Rules of Practice do not require what Petitioners suggest. The Rules of Practice require that a moving party file a Rule 7(f) Statement with its motion for summary judgment. The Rules of Practice permit the non-moving party to file a responsive Rule 7(f) Statement if there are facts contained in the moving party's Rule 7(f) Statement which the non-moving party contests. The Rules of Practice do not, however, require that a moving party file a second Rule 7(f) Statement in response to that filed by a non-moving party or that a non-moving party file a second Rule 7(f) Statement in response to a second Rule 7(f) Statement filed by the moving party. To read the Local Rule of Practice as Petitioners suggest would lead to a result which cannot have been intended by the District Court — to require or even permit opposing parties in a motion to file numerous and/or unlimited Rule 7(f) Statements.

In addition, Respondent's Rule 7(f) Statement clearly disputed those "facts" set forth in Petitioners Rule 7(f) Statement.

Further, Petitioners' Rule 7(f) Statement also contained legal conclusions which are not permitted by the Rules of Practice to be included therein.

Finally, the District Court made specific findings which rejected the facts as set forth in Petitioners' Rule 7(f) Statement.

Petitioners' request to the Second Circuit for rehearing en banc was denied on March 21, 2000.

In June 2000, Petitioners' filed a Petition for a Writ of Certiorari with this Honorable Court.

REASONS FOR DENYING THE WRIT

I.

REVIEW OF THE PETITION IS UNNECESSARY BECAUSE THE DECISION OF THE COURT BELOW IS CONSISTENT WITH PRECEDENT REGARDING RELIGIOUS INSTRUCTION, WORSHIP AND PRAYER IN THE PUBLIC SCHOOL SETTING

A. The Second Circuit's Decision is Consistent with This Court's Prior Decisions Regarding Religious Instruction, Worship and Prayer in the Public Schools

It is well-settled that religious instruction conducted in public schools during the hours of mandatory instruction violates both the First and Fourteenth Amendments to the Constitution of the United States. In *McCollum v. Board of Education of School District No. 17, Champaign County, Ill.*, 333 U.S. 203, 68 S. Ct. 461 (1948), the State of Illinois had a statute which permitted its school districts to release children between the ages of seven and sixteen from their regular secular education classes to attend classes in religious instruction in public school buildings. *Id.* at 204, 462. This Court found that the statute and the facts of the case supported the conclusion that the State's compulsory education system impermissibly assisted and was integrated with the religious instruction carried on by separate religious sects on tax-supported property. *Id.* at 209, 464. Accordingly, this Court held that the State's statute violated both the First and Fourteenth Amendments. *Id.* at 204, 462.

In the case at bar, Petitioners intend to conduct a program of religious instruction, worship and/or prayer for Christians on tax-supported public property — the facilities owned and operated by Respondent. The fact that the proposed religious instruction, worship and/or prayer is planned for a time frame *immediately following* that dedicated for secular instruction, as opposed to a time frame within that dedicated for secular instruction as in *McCollum*, does not diminish the fact that Petitioners' intended use of Respondent's facilities violates the First and Fourteenth Amendments by forcing Respondent to endorse Christianity over all other religions and over no religion at all.

Moreover, this Court has long viewed public schools as a special environment in need of certain protections, including the banning of government-initiated prayer therein. In *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962), the Respondent Board of Education directed the School District's Principal to cause the following prayer to be said aloud each day in each class:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our Country. *Id.* at 422, 1262.

This Court found that the School District violated the Establishment Clause of the First Amendment by requiring that the foregoing prayer be recited at the beginning of each school day. *Id.* at 424, 1264.

Although the recitation of this daily prayer occurred during the school day, while the prayer proposed by Petitioners would occur immediately following the school day, Respondent maintains that this fact is not dispositive, especially in light of the fact that this Court has also banned government-initiated

prayer at non-instructional activities occurring outside regular school hours.

In *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992), a middle school student objected when the Respondent School District invited a member of the clergy to give an invocation and benediction at her middle school graduation. *Id.* at 581, 2652. Recognizing, as it has consistently done in the past, that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools" and "that prayer exercises in public schools carry a particular risk of indirect coercion" (*Id.* at 592, 2658), this Court found that the School District's actions violated the Establishment Clause of the First Amendment.

This Court has issued a similar holding even where prayer at non-instructional events is student-initiated, student-led, nonsectarian and nonprostelyzing. In *Santa Fe Independent School District v. Doe, et al.*, 530 U.S. __, __ S. Ct. __, 2000 WL 775587 (2000), this Court invalidated two of the School District's policies permitting students to vote to determine whether a student would deliver a prayer at varsity football games and to select which student would deliver said prayer. *Id.* at 14.

1. The Second Circuit Properly Recognized that There is No Fundamental Right to Free Speech in a Limited Public Forum

While the First Amendment of the United States Constitution prohibits Congress from making any law abridging the freedom of speech, that freedom is not absolute and may be limited in a variety of ways. For example, the content of speech may be regulated if necessary to serve a compelling state interest and where the means utilized to achieve that end are narrowly

tailored. *Simon & Schuster, Inc. v. Members of the New York State Crimes Victims Board*, 502 U.S. 105, 112 S. Ct. 501 (1991). Similarly, content-neutral restrictions, such as time, place and manner restrictions, may be imposed on speech. Additionally, the freedom not to speak is protected constitutionally. *See, for example, West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178 (1943); and *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428 (1977).

The parties herein have stipulated, and the Second Circuit has affirmed, that Respondent has created a limited public forum, pursuant to N.Y. Education Law Section 414, on its property by permitting youth groups such as the Boy Scouts, Girl Scouts and the local Little League to use its facilities. The parties have also stipulated that some of these groups may attempt to promote the moral and character development of children.

"Limited public forums" are those which have been designated by government as a "place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household*, at 211, *quoting Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449 (1985).

In *Bronx Household*, a Church and its Pastors brought an action against a School District and its officials challenging the District's refusal to allow the Church to use its public Middle School Auditorium for weekly religious worship. The Second Circuit held that a public school was a limited public forum. *Id.* at 211-213. The Court also held that the School District's policy of excluding religious services at school was reasonable and viewpoint neutral. *Id.* at 214-215. The Court opined:

> *There is no fundamental right of freedom of speech in a limited forum from which various types of*

> *speakers and subjects are properly excluded. Nor is the free exercise of religion a fundamental right in a properly limited public forum*. It is only when a traditional public forum "is opened up to assembly or speaking by some groups [that] government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.* at 217 [citations omitted] [*emphasis added*].

Accordingly, "[r]estrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral." *The Good News Club, et al. v. Milford Central School,* 202 F.3d 502, 509 (2nd Cir. 2000), *quoting Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 829-830 (1995); and *Bronx Household*, at 214.

Thus, the Second Circuit's decision in this matter and in *Bronx Household* properly reinforce prior decisions of the Second Circuit, as well as this Court, permitting government officials to regulate speech occurring in limited public forums. *See, for example, Deeper Life I* [where the Second Circuit held that, under the limited public forum doctrine, government property remains a non-public forum as to all unspecified uses and exclusions of uses]; *International Society for Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2nd Cir. 1991), *cert. granted*, 502 U.S. 1022, 112 S. Ct. 855 (1992) [where the Second Circuit held that any regulation of expressive activity in a non-public forum need only be reasonably related to a legitimate governmental concern]; and *Full Gospel Tabernacle, et al. v. Community School District No. 27, et al.*, 979 F. Supp. 214 (S.D.N.Y. 1997), *aff'd*, 164 F.3d 829 (2nd Cir. 1999) [where the Second Circuit held that the fact that a School District gave its permission to use its facilities for religious worship on two prior occasions did not mean that the District has opened its limited public forum for future religious worship].

See also Cornelius; and *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981).

2. The Second Circuit Also Properly Recognized that Respondent is Not Permitted By Education Law Section 414 to Allow Petitioners to Use its Facilities for Religious Instruction, Worship and/or Prayer

Respondent is not permitted by Section 414 of the Education Law (or Respondent's Community Use Policy), to allow Petitioners to use its facilities for religious purposes. The Second Circuit has agreed.

In *Deeper Life Christian Fellowship, Inc. v. Sobol* [*Deeper Life II*], 948 F.2d 79 (2nd Cir. 1991), the Second Circuit opined:

> We follow our opinion in *Deeper Life I* in holding that under § 414, "access to the school property is limited only where it serves the interests of the public in general rather than that of sectarian groups. . . ." The prior panel did not construe the statute as giving *any* discretion — bridled or unbridled — with respect to the granting of use permits to religious groups: such permits simply may not be issued. Moreover, as the panel pointed out, "the regulations governing the use of school premises expressly exclude fundraising for, teaching tenets of, or distributing material promoting a particular religion."

Id. at 83 [*emphasis in original*].

Further, the purpose of Education Law Section 414 is to promote *general knowledge*, not the type of knowledge Petitioners intend to promote during their religious instruction sessions. In *Deeper Life I*, the Second Circuit observed:

> Nor are the activities of the Deeper Life church really similar to those purposes enumerated in section 414,

as [Deeper Life] argues. The subdivisions of the statute and the Commissioner's decisions . . . interpreting those provisions demonstrate . . . that access to the school property is permitted only where it serves the interests of the public in general, rather than that of sectarian groups. [Deeper Life] argues that because its services are open to the general public, this meets the requirements of section 414. It seems clear, however, that the church's activities are primarily for its own benefit. . . . And while [Deeper Life] argues that it should come under section 414(1)(a)'s provision that opens the schools "[f]or the purpose of instruction in any branch of education, learning or the arts," *the thrust of the statute is to promote general knowledge, rather than to promote a forum for proselytizing or indoctrinating the public in a particular group's beliefs*.

Id. at 680 (*emphasis added*).

Petitioners herein do not intend to promote general knowledge; they do, however, admittedly seek a forum to proselytize and indoctrinate elementary school-aged children into the beliefs of Christianity. Even a cursory review of the Request Form submitted by Petitioners establishes that they intend to use Respondent's facilities for religious purposes (*i.e.: religious instruction, worship and prayer*). Recall that they asked to use the facilities for "**singing songs, *hearing Bible lesson[s] and memorizing Scripture***."

Clearly, this Court has reviewed with caution any attempts made by various religious and governmental entities to engage in religious instruction, worship and/or prayer in the public school setting.

Respondent respectfully maintains that the decision of the Second Circuit in the case below, as well as in other related cases, establishes that the Second Circuit has properly interpreted this Court's decisions concerning the establishment of limited public forums and the fact that there is no fundamental right to free speech in a limited public forum. Further, the Second Circuit has properly applied the provisions of Education Law Section 414 to determine that Petitioners' intended use of Respondent's facilities is not in accordance with same.

B. The Second Circuit's Decision is Consistent with the Equal Access Act

Congress has declined to allow student-initiated and student-led prayer groups in the public elementary school setting although it has allowed these groups in the secondary school setting. In 1984, Congress enacted the Equal Access Act (20 U.S.C. §§ 4071-4074) (hereinafter, the "Act") to allow students in public secondary schools to initiate Bible clubs and conduct prayer groups on school premises during non-instructional time. *See also Board of Education of the Westside Community Schools (Dist. 66), et al. v. Mergens, et al.*, 496 U.S. 226, 110 S. Ct. 2356 (1990) (upholding the Act).

Notably, Congress limited the scope of this legislation to secondary school-aged children. Presumably, Congress was well aware of the fact that children enrolled in elementary schools are far more impressionable than those enrolled in secondary schools and that the former could not easily distinguish, if at all, between school-sponsored religious activities and private speech. If this were not the case, Congress would have specified that this legislation was applicable to all public school students.

Furthermore, the Act makes clear that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071(c)(5). Thus, even where

secondary students do meet, Congress was sensitive to the fact that outsiders such as clergy should not lead, or even regularly attend, these meetings.

Respondent respectfully submits that Petitioners have completely disregarded both the Equal Access Act itself and the Congressional intent behind it in demanding that Respondent permit them to conduct their weekly religious instruction, worship and/or prayer meetings on its premises.

C. The Second Circuit's Decision is Consistent with the New York State Education Law

Section 414 of the New York State Education Law specifically delineates the purposes for which school houses, school grounds and other school property may be used. More specifically, the law provides that:

> 1. . . . . The trustees or board of education may adopt reasonable regulations for the use of . . . schoolhouses, grounds or other property . . . for any of the following purposes:
>
> * * *
>
> [d] For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; *but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination. . . .*

N.Y. Education Law § 414 (*emphasis added*). *See also* attached Appendix.

The list of permitted uses set forth in Education Law Section 414 does not include meetings for religious purposes. In fact, the law expressly prohibits meetings which benefit a religion.

Although Education Law Section 414 has been the subject of review a number of times, no Court, including this one, has ever declared its purposes or language unconstitutional. *See, for example, Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384,* 113 S. Ct. 2141 (1993); *Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York (Deeper Life I)*, 852 F.2d 676 (2nd Cir. 1988); *Deeper Life Christian Fellowship, Inc. v. Sobol (Deeper Life II)*, 948 F.2d 79 (2nd Cir. 1991); and *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997).

Respondent respectfully submits that both its Community Use Policy, and its application thereof, are in complete accordance with Education Law Section 414 in that they prohibit the use of Respondent's facilities for religious purposes.

II.

REVIEW OF THE PETITION IS UNNECESSARY BECAUSE THERE IS NO DISAGREEMENT AMONG THE CIRCUITS AS TO THE PROPER APPLICATION OF THE RELEVANT CONSTITUTIONAL PRINCIPLES OR THE PRIOR DECISIONS OF THIS HONORABLE COURT

A. There is No Disagreement Between the Second and Eighth Circuits as to Whether the Speech of Petitioners' Religious Organization Amounts to Religious Instruction, Worship and/or Prayer

In *Good News Club/Good Sports Club v. City of LaDue*, 28 F.3d 1501 (8th Cir. 1994), the School District prohibited the Club from meeting in its facilities within a certain time frame (from 3:00 to 6:00 PM in the evening). Assuming that the

District was engaging in viewpoint discrimination, as opposed to content-based discrimination, the Eighth Circuit ruled that the Respondent School District unlawfully discriminated against the Club on account of its viewpoint.

Notably, Senior Circuit Judge Bright filed a strong dissent in the case:

> The majority opinion in this case . . . seizes on a single claim made by the plaintiffs that the school policy results in viewpoint discrimination against the Club. That conclusion is reached by ignoring Judge Filippine's careful and detailed findings of fact, misconstruing the factual record made in the case and thereafter attempting to apply the precedent of *Lamb's Chapel v. Center Moriches School District*, . . . to reach its conclusion. Because *Lamb's Chapel* does not control on the facts of this case, the majority reaches an erroneous result. *Id.* at 1511 [citations omitted].

Judge Bright went on to criticize the majority for "judicial activism which has no warrant under existing law." *Id.* at 1511-1512. He concluded that all that was necessary to decide the issue was a broad review of the reasonableness of the School District for amending its policy. Once that was found to be reasonable, there was no reason to interfere with the School District's decision. *Id.* at 1513-1515.

As the Second Circuit correctly pointed out, the Eighth Circuit "apparently took for granted that the Good News/Good Sports Club's activities amounted only to speaking on moral and character development." *Good News v. Milford*, at 511. As Judge Bright pointed out in his dissenting opinion, the Eighth Circuit did not delve deeply into the facts of its case. Had the Eighth Circuit examined the actual content of the Club's

meetings, as did the Second Circuit, the Eighth Circuit would have been compelled to come to the same conclusion as the Second Circuit — that the Club's activities go far beyond teaching moral and character development from a religious viewpoint.

Further, the Eighth Circuit's case dealt with secondary school-aged children, not elementary school-aged children as did the case before the Second Circuit. Notably, the Eighth Circuit itself expressed a concern for elementary school-aged children by citing in its decision *Quappe v. Endry*, 772 F. Supp. 1004, 1011-1012 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992), and distinguishing between children aged five to ten years, from those in *Good News Club v. LaDue* aged eleven through fifteen years. Because the Second and Eighth Circuits have not addressed the same issues, they are not in disagreement with respect to same.

B. There is No Disagreement Between the Second and Tenth Circuits as to Whether a Government Forum Can Exclude Moral Instruction from a Religious Viewpoint When it Permits Other Kinds of Moral Instruction

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), the City of Albuquerque had in place a policy which prohibited religious instruction at its City-owned senior center. *Id.* at 1277. A local church requested that the City permit the church to show a film entitled "Jesus" at the senior center. The film contained an invitation to its viewers to accept Jesus Christ as their savior. *Id.* The City denied the church's request. The Tenth Circuit held that the City's decision amounted to viewpoint discrimination and found in favor of the church. *Id.* at 1279.

The case at bar is primarily distinguishable from *Church on the Rock* for the same reasons that it is distinguishable from *Good News Club v. LaDue*. First, the case at bar is concerned

with restrictions placed on speech on account of its content while *Church on the Rock* was concerned with viewpoint discrimination. Second, the audience in *Church on the Rock* was comprised of adults, more specifically, senior citizens, while the audience at Petitioners' meetings are captive elementary school-aged children. Quite obviously, senior citizens can more easily discern private from public speech than can elementary-aged children. Furthermore, senior citizens are free to leave a film screening if they find the religious views expressed therein distasteful; elementary school-aged children may not freely leave a Club meeting. Finally, the City in *Church on the Rock* had previously opened its doors for other religious presentations while the Respondent herein has not. Because the Tenth Circuit has not issued an opinion on issues even remotely resembling those reviewed by the Second Circuit, the two cannot be in disagreement as to those issues.

C. The Second and Fifth Circuits Do Not Conflict with the Ninth Circuit Over the Proper Application of *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993)

In *Gentala v. City of Tucson*, F.3d (Nos. 97-17062 and 97-1069), 2000 WL 423460 (9th Cir. 2000), the City of Tucson rejected the Gentala's application for coverage of the costs of City services for a local observance of the National Day of Prayer which was held in one of the City's public parks because the Fund prohibited the support of religious organizations. *Id.* at 1. The Ninth Circuit held that City's denial amounted to impermissible viewpoint discrimination.

Even a cursory review of the facts of *Gentala* establishes that the Ninth Circuit did not review the issues now before this Court. First, the *Gentala* Court determined that the City's denial of access to the Fund amounted to viewpoint discrimination while the case at hand clearly involves a content-based restriction. In addition, *Gentala* dealt solely with a denial of

monies from a civic events fund, not religious instruction, worship, prayer and indoctrination involving elementary school-age children. Further, the activities in *Gentala* took place in a public park, a prime example of a traditional public forum (*see Hague v. CIO*, 307 U.S. 496, 59 S. Ct. 954 (1939)), while the activities in this case are intended for an elementary school. Moreover, the participants in the activities in *Gentala* were free to both meander around the public park, tuning in and out of the speech occurring there, while the young students in this case are a captive audience. Finally, the Court in *Gentala* relied on the fact that the Fund in issue was expressly established for civic purposes. Conversely, Respondent herein was established for educational purposes. Clearly then, the Ninth Circuit has not rendered an opinion on content-based discrimination in an elementary school setting; therefore, there is no disagreement between the Ninth and the Second Circuits as the proper application of *Lamb's Chapel*.

In *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000), the School District had a community use policy, almost identical to that of Respondent, which prohibited the use of its facilities for religious services and/or instruction. *Id.* at 484. The District denied the use of its facilities to the Louisiana Christian coalition for a prayer meeting which included, *inter alia*, religious prayer and instruction. *Id.* The Fifth Circuit, relying on the decision of the Second Circuit in *Bronx Household*, held that the District's denial was a permissible content-based regulation in its limited public forum. *Id.* at 487.

The Fifth Circuit and the Second Circuit have both properly recognized a distinction between permissible discrimination based on *content* and impermissible discrimination based on *viewpoint*. Acknowledging the fact that *Lamb's Chapel* declared the exclusion of a meeting on a permissible subject because of

the speaker's religious *viewpoint* to be unconstitutional, the Fifth Circuit observed:

> *This does not mean that any ban on religious activities amounts to viewpoint discrimination. Religion may be either a perspective on a topic such as marriage or may be a substantive activity in itself. In the latter case, the government's exclusion of the activity is discrimination based on content, not viewpoint.*
>
> The *Bronx Household* court held that religious services and religious instruction are activities which may be excluded as content-based discrimination. We agree, finding that religious services and instruction are not simply approaches to a topic, but activities whose primary purpose is to teach and experience the subject of religion. These are activities distinct from a topical discussion, a social gathering, or a political meeting. The District has excluded such religious activities but does not forbid speakers on general topics with a religious perspective – a distinction that viewpoint neutrality permits.

Id. (citation omitted) (*emphasis added*).

For the same reasons that the Second Circuit's decision in this matter can easily be distinguished from the Ninth Circuit's decision in *Gentala*, the Fifth Circuit's decision in *Campbell* can just as easily be distinguished — *Gentala* dealt with Viewpoint discrimination while *Campbell* dealt with content-based discrimination. Thus, the Fifth and the Ninth Circuit are not in disagreement as to the issues now before the Court.

D. The Second Circuit Does Not Conflict with This Court's Decision in *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995)

In *Lamb's Chapel*, 515 U.S. 384, 113 S. Ct. 2141 (1993), the School District denied the requests of a local evangelical church to use its facilities to show a six-part film series on the topic of child rearing from a Christian perspective. *Id.* at 387-388, 2144-2145. The School District relied on its community use policy which was enacted pursuant to Section 414 of the New York Education Law. Finding that the District's exclusion of the Church under the circumstances presented in that case amounted to impermissible viewpoint discrimination, this Court found the District's actions to be in violation of the Church's First Amendment rights.

The Second Circuit's decisions in *Bronx Household* or in the case at bar are not contrary to this Court's holding in *Lamb's Chapel*. In *Lamb's Chapel*, this Court was concerned with impermissible *viewpoint* discrimination. In both *Bronx Household* and this case, the Second Circuit was concerned with permissible *content-based* discrimination in public school settings. As the Second Circuit properly noted, in the case below, Petitioners' intended use of Respondent's facilities goes beyond the teaching of moral values from a Christian perspective:

> Though such teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier, contains an additional layer:
>
> > [T]hese moral or these values are senseless without Christ, that's to the children who know Christ as Savior, we

> would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord Savior so that you might overcome these, you know, feelings of jealousy.
>
> * * *

The activities of the Good News Club do not involve merely a religious perspective on the secular subject of morality. The Club meetings offer children the opportunity to pray with adults, to recite biblical verse, and to declare themselves "saved." The Club argues that these practices are necessary because its viewpoint is that a relationship with God is necessary to make moral values meaningful. *Even accepting that this precept is a viewpoint on morality and not a religious principle, it is clear from the conduct of the meetings that the Good News Club goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ. Under even the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious. Good News Club v. Milford*, at 509-510 [citations omitted] [*emphasis added*].

In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995), a college student organization was denied college funding for the publication of a Christian periodical entitled "Wide Awake." *Id.* at 825-827, 2514-2516. The periodical contained several challenges to readers to accept Jesus Christ as their savior and to establish a relationship with Him. *Id.* at 865-867, 2534-2535. This Court

held that the invitation to college students to accept Jesus Christ as their savior did not amount to religious instruction.

Contrary to the assertions of Petitioners, the case at bar is readily distinguishable from *Rosenberger*. Primarily, the readers of the periodical in *Rosenberger* were college-aged adults, not elementary school-aged children. Second, challenging adults who read a periodical at their leisure is far different than challenging a captive audience of elementary school-aged children to come forward and accept Christ. Third, Petitioners set up and conduct their meetings similar to the way a class in school is conducted. The sessions, which have all the imprimatur of the school, stress religious beliefs: beliefs in Jesus Christ and other religious teachings. These facts clearly distinguish reading a newspaper from attending Petitioners' meetings.

Respondent respectfully submits that the Second Circuit's decisions do not conflict with those of this Court in either *Lamb's Chapel* or *Rosenberger*. In fact, they are in complete accordance with same.

E. The Second Circuit's Decision Does Not Conflict with This Court's Decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981)

In *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981), the University of Missouri at Kansas advised a religious student group that it could no longer use its facilities for its regular meetings because the University's Board of Directors had adopted a policy prohibiting the use of University facilities for religious worship and/or instruction. *Id.* at 272, 265. Because this Court determined that the University had created a designated public forum, the Court pointed out that the University had to satisfy the standard of review applicable to content-based discrimination — "[i]t must show that its regulation is necessary to serve a compelling state interest and

that it is narrowly drawn to achieve that end." *Id.* at 274, 270. This Court ultimately held that the University's action violated the students' First Amendment rights.

The Second Circuit's decision complies with the standards set forth above. In the case below, the Second Circuit observed that "it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises." *Good News Club v. Milford,* at 509 [citation omitted]. Relying on its prior decision in *Bronx Household,* the Second Circuit reasoned that:

> It "is not difficult for school authorities to make" the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.
>
> Although other cases may present difficult questions of line-drawing, we believe that the school authorities [in the case at bar], after thorough inquiry and deliberation, correctly determined that the activities of the Club fall clearly on the side of religious instruction and prayer. *Id.* at 510 [citation omitted].

Therefore, contrary to the allegations of Petitioners, the Second Circuit had not delved into the *significance* of speech in a University setting in arriving at its decisions; it has instead focused on the *existence* of the speech itself in public elementary schools. Nor has the Second Circuit resisted the development of objective guidelines for use by government officials in determining when the presentation of morals from a religious perspective crosses the line and becomes religious instruction; the Court made it clear that the distinction is one easily made and, therefore, such guidelines are not necessary.

Also worth noting at this point is the fact that, if either the Second or the Fifth Circuit had concluded that the respective Districts involved were *not* empowered to review proposed speech for appropriateness in the public schools, the Districts effected thereby would in essence be required to open their doors to all religious activity including, *inter alia*, religious services. This result cannot be the intent of this Court.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — SECTION 414 OF THE NEW YORK STATE EDUCATION LAW

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED EDUCATION LAW
CHAPTER 16 OF THE CONSOLIDATED LAWS
TITLE I—GENERAL PROVISIONS
ARTICLE 9—SCHOOL BUILDINGS AND SITES
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Section 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the

use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

(k) The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses

for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

Supreme Court, U.S.
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No. 99-2036

In The

SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ET AL.,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF

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1. Respondent offers no persuasive reasons why certiorari should not be granted to resolve a direct and explicit conflict among the Circuit Courts.

Respondent argues that certiorari should not be granted because (1) the Second Circuit decision is consistent with this Court's Establishment Clause cases, (2) the Second Circuit upheld the constitutionality of statute, and (3) there is no conflict among the Circuit Courts concerning the appropriate application of *Lamb's Chapel*. These arguments are misplaced and do not diminish the merits of petitioner's request for a writ of certiorari.

A. Respondent's Establishment Clause argument is unpersuasive.

Respondent's argument that the Second Circuit decision is consistent with this Court's Establishment Clause cases is a red herring. Without debating the merits of respondent's assertions, it suffices to point out to the Court that the Establishment Clause was not an issue in the Second Circuit's holding or opinion.

Moreover, if the Second Circuit had reached Milford's Establishment Clause argument and further if Second Circuit had decided the Establishment clause barred GNC's use of Milford's facilities, such a decision would have created a conflict with other Circuits. The federal courts have held that grade school age children can distinguish between government speech and private speech. *See Sherman v. Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993) (explicitly finding that grade school children can understand that the school did not endorse the religious speech of the Boy Scouts even though the school

allowed the Boy Scouts to distribute flyers during school hours and to conduct their meetings after class); *Good News Club/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1509, fn. 18 (8th Cir. 1994) (noting that it does not require "Solomonic wisdom" for elementary students between ages 5 and 10 to make a distinction between private speech and government speech); *Hedges v. Wauconda Community School Dist. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) (rejecting the argument that "in order to avoid the appearance of sponsorship," a school may restrict religious speech in a junior high school).

Further, such a decision would have called into question this Court's decision holding that there is a critical difference between government speech endorsing religion, which the Establishment clause forbids, and private speech endorsing religion, which the Free Speech Clause protects. *Board of Education of Westside v. Mergens*, 496 U.S. 226, 248-53 (1990) (Bible club conducted by students on school property does not violate Establishment Clause); *Lamb's Chapel v. Center Moriches School Dist*, 508 U.S. 384, 395 (1993) (no violation of Establishment Clause for church to show religious film after school hours on school property); *Rosenburger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 839-40 (school funding of Christian newspaper does not violate Establishment Clause where funding is available to all student groups equally).

B. Respondent's reliance on Education Law §414 is unpersuasive.

Respondent asserts that New York law mandates that it exclude all speech with a religious purpose from its facilities and that the Second Circuit held the mandatory

exclusion constitutional. Respondent, therefore, reasons that since the statute passed constitutional muster in the Second Circuit, the case does not merit review by this Court[1].

It is precisely the way that the Second Circuit resolved this case that merits review by this Court. The Second Circuit's resolution of this case called into question the decisions of this Court, *See Good News Club v. Milford Central School*, 202 F.3d 502, 513 (2nd Cir. 2000) (Judge Jacobs in dissent noting that the majority's holding could not be squared with *Lamb's Chapel*); explicitly created a stark conflict among the Circuit Courts, *See* Petition for Writ of Certiorari p. 9-16 (outlining the precedent from other Circuit Courts that the Second Circuit explicitly declined to follow); and caused consternation among the states, see the brief for *Amici Curiae* of the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia in support of petition for a writ of certiorari at p.2 (arguing that the Second Circuit's decision places "*amici* States in the position of attempting to discern whether previously certain course set by the principle of viewpoint neutrality remains good law in all cases, or if it must be modified").

---

[1] This Court, in *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993), had apparently resolved the issue of the application of § 414 with respect to the exclusion of speakers with a religious purpose. The Court held that a school district could not use Education Law §414 to bar a sectarian group's speech, even if the speech has a religious purpose. *Lamb's Chapel*, 508 U.S. at 393.

C. Respondent's assertion that there is no conflict among the Circuit Courts is unpersuasive.

Respondent seeks to distinguish the conflict between the Second Circuit and the other Circuits Courts on the issue of discrimination against a speaker's viewpoint on the basis that GNC's speech is directed to a child audience. This distinction is irrelevant, without merit, and was never addressed by the Second Circuit.

First, respondent's child audience theory is an irrelevant way to distinguish the conflict. The question of whether a government rule discriminates against a speaker's viewpoint is independent of the nature of the audience. That is, whether the audience is made up of adults or children or there is no audience at all, if the government discriminates against a speaker on the basis of his viewpoint, then it has violated the First Amendment absent a compelling state interest.

Second, respondent's theory is without a factual basis. Respondent maintains that 6-12 year old children, because of their age, are unable to distinguish between the private speech of GNC and the speech of teachers. There is no evidence to support this contention. Even the youngest child knows the difference between a meeting conducted after school which she voluntarily chooses to attend and speech conducted by a teacher in the classroom which she has no choice but to attend. Certainly, petitioner, Andrea Fournier, six (6) years old at the time of commencing her lawsuit, was not confused that GNC meetings were not part of the school curriculum. Milford in no way compels children to attend GNC meetings. Attendance to hear GNC's speech is voluntary and requires parental

permission. Thus the children who attend GNC meetings are not a captive audience.[2]

Third, the Second Circuit never sought to distinguish precedents from the other circuits on the basis that GNC's audience was children. Rather the Second Circuit explicitly declined to follow *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996) and *Good News/Good Sports Club v. School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994).

CONCLUSION

The Second Circuit's resolution of this case calls into question the decisions of this Court, explicitly creates a stark conflict among the Circuit Courts, and causes consternation among the states. As noted in the Amici States' brief "this is an issue of national importance that requires resolution by this Court." Respondent offers no cogent reason why this Court should not issue a writ of certiorari to the Second Circuit.

---

[2] The very premise of Milford's claim that the children can not distinguish between GNC meetings and classroom instruction is betrayed by Milford's own actions. The District Court granted an injunction to allow GNC to hold club meetings at Milford's facilities. If Milford believed that children were not able to distinguish between Good News Club meetings and classroom instruction, after the preliminary injunction was issued, Milford would have produced some sort of disclaimer to make clear to the children that GNC's speech was not the school's speech. No such disclaimer or explanation was offered to the children or their parents. Milford's actions reveal the hollowness of its argument.

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In The

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THE GOOD NEWS CLUB, et al.,

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v.

MILFORD CENTRAL SCHOOL.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR *AMICI CURIAE*, THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TEXAS, AND VIRGINIA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution?

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution?

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BRIEF FOR *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit filed in this case by Petitioners The Good News Club, Andrea Fournier, and Darleen Fournier.

INTEREST OF *AMICI CURIAE*

The States joining in this brief as *amici curiae* have a profound interest in protecting the free-speech rights and religious liberties of their citizens, and in ensuring that their public school officials have clear and reliable guidance when they face questions concerning the use of public school property by religious organizations. The decisions of the lower courts in this case, *Good News Club* v. *Milford Central School*, 202 F.3d 502 (2d Cir. 2000), *aff'g* 21 F. Supp. 2d 127 (N.D.N.Y. 1998), subject religious speech to unconstitutional viewpoint-based discrimination and muddy the water in an area of First Amendment law that has been clear.

State and local school officials in the *amici* States have long relied on the guidance in cases such as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), in adopting neutral policies governing the use of public school facilities. *See, e.g.*, Office of the Attorney General, State of Alabama, *Guidelines for*

Religious Activities in Schools (July 29, 1999) (reproduced in Appendix at 1a); *see also* U.S. Dep't of Educ., *Religious Expression in Public Schools* (Rev. ed. May 1998) (reproduced in Appendix at 1b). In following the course of neutrality, state and local officials have been assured by this Court's decisions that they could safely navigate between the Scylla of violating the Free Speech Clause and the Charybdis of violating the Establishment Clause when facing requests for use of public school facilities by religious clubs and organizations.

The decision below in this case casts doubt on the scope of this Court's precedents, leaving officials in the *amici* States in the position of attempting to discern whether the previously certain course set by the principle of viewpoint neutrality remains good law in all cases, or if it must be modified. This uncertainty leaves public officials open to lawsuits no matter what they decide when a religious club or organization requests to use school facilities. The *amici* States respectfully submit that this is an issue of national importance that requires resolution by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SECOND CIRCUIT IN THIS CASE SUBJECTS RELIGIOUS SPEECH TO UNCONSTITUTIONAL VIEWPOINT DISCRIMINATION.

The decision in this case is a substantial and troubling departure from the guiding principle of neutrality embodied in this Court's precedents regarding free speech and religious liberties in limited public fora created by public schools and universities. *See, e.g., Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 120 S. Ct. 1346,

1350, 1356-57 (2000); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839-46 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-97 (1993); *Widmar* v. *Vincent*, 454 U.S. 263, 277 (1981).[1]

This case involves the same state statute, N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 2000), at issue seven years ago in *Lamb's Chapel*. *See* 508 U.S. at 386. This case also involves a school board policy similar to that in *Lamb's Chapel*. *Compare id.* at 387 (describing Center Moriches policy) *with* App. to Pet. for Cert. at D1-D3 (Milford policy). Without mentioning *Lamb's Chapel*, however, the Second Circuit held that the school's action was a permissible form of content discrimination, rather than impermissible viewpoint discrimination. *See* 202 F.3d at 509-11. One judge dissented, however, stating that he could not "square the majority analysis in this case with *Lamb's Chapel*." *Id.* at 513 (Jacobs, J., dissenting).

With its ruling, the Second Circuit – speaking through the author of the decision reversed in *Lamb's Chapel*[2] – attempted to revive reasoning rejected by this Court in that case and in *Widmar* and *Rosenberger*. The *amici* States submit that under this Court's precedents, the decision of the Second Circuit must be reversed.

---

[1] The parties agreed, and the courts below held that Milford Central School had created a limited public forum through its community use policy. 202 F.3d at 509; 21 F. Supp. 2d at 153. This Court's recent decision in *Santa Fe Independent School District* v. *Doe*, 530 U.S. ___ (2000), is thus inapposite here because the Court held that no public forum had been created in that case. *Id.* at ___ & nn.12-13 (slip op. at 10-11 & nn.12-13).

[2] *See* 202 F.3d at 504 (showing Judge Miner as author of opinion); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 383 (2d Cir. 1992) (same), *rev'd*, 508 U.S. 384 (1993).

A. Public Officials May Not Engage in Viewpoint Discrimination Against Religious Speech in a Limited Public Forum.

1. *Widmar* v. *Vincent*

In 1981, this Court held that "religious worship and discussion" in a limited public forum "are forms of speech and association protected by the First Amendment." *Widmar* v. *Vincent*, 454 U.S. at 269. Accordingly, the discriminatory exclusion of religious speech from a limited public forum can only be justified if it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Id.* at 270. The University of Missouri at Kansas City had contended in *Widmar* that allowing religious groups and speakers to use its facilities would violate the Establishment Clause, asserting the need to avoid such a violation as a compelling interest requiring the exclusion of the religious groups. *Id.* at 270-71. This Court rejected that argument, however, holding that an "equal access" policy to the limited public forum would not violate the Establishment Clause. *Id.* at 271, 273-75. The Court thus held that the University's interest was insufficient to justify a content-based restriction on speech. *Id.* at 276-77.

The dissent in *Widmar* "argue[d] that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." *Id.* at 269 n.6 (citing *id.* at 284 (White, J., dissenting)). The Court rejected this attempt to distinguish "between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' constituting 'worship.'" *Id.* at 269 n.6 (quoting *id.* at 285 (White, J., dissenting)). The Court cited "at least three difficulties"

with attempting to distinguish between religious "speech" and religious "worship" for purposes of First Amendment protection:

> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be "singing, teaching, and reading" – all apparently forms of "speech," despite their religious subject matter – and become unprotected "worship."
>
> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.
>
> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. . . . [I]t gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted. . . .

Id. at 269-70 n.6 (citations omitted) (quoting *id.* at 283 (White, J., dissenting)).

2. *Lamb's Chapel* v. *Center Moriches Union Free School District*

In 1993, this Court again addressed the issue of a religious organization's access to a limited public forum. As noted, *Lamb's Chapel* v. *Center Moriches Union Free School District* involved the application of a school board's community access policy, similar to the Milford policy, adopted pursuant to N.Y. Educ. Law § 414. 508 U.S. at 386-87. The Center Moriches policy allowed school facilities to be used after school hours for "social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with § 414 (Rule 8)." *Id.* at 387. The policy forbade, however, use of school facilities " 'by any group for religious purposes.' " *Id.* (quoting policy).

Lamb's Chapel, "an evangelical church in the community of Center Moriches," *id.*, applied for permission to use school facilities to show a film series by a Christian psychologist, Dr. James Dobson. *Id.* at 387-88 & n.2. According to the Court, a "brochure stated that the film series would discuss Dr. Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage." *Id.* at 388. The school board denied the church's applications because the film series " 'appear[ed] to be church related.' " *Id.* at 389.

The district court upheld the school board's decision, "not[ing] that the enumerated purposes for which § 414 allowed access to school facilities did not include religious worship or instruction, that Rule 7 explicitly proscribe[d] using school facilities for religious purposes, and that the Church had conceded that its showing of the film series would be for religious purposes." *Id.* (citing

770 F. Supp. 91, 92, 98-99 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993)). The Second Circuit affirmed. 959 F.2d 381 (2d Cir. 1992), *rev'd*, 508 U.S. 384 (1993). The Second Circuit observed that exclusions from a limited public forum "need only be reasonable and viewpoint neutral, and ruled that denying access to the church for the purpose of showing its film did not violate this standard." 508 U.S. at 390 (citation omitted). The Court of Appeals concluded that the exclusion of the church "was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes." *Id.* at 393.

This Court reversed. 508 U.S. at 390-97. The Court acknowledged that, as a limited public forum, control over access to the forum "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 392-93 (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The Court concluded, however, that the application of the school board policy to exclude the church's presentation of a film series on family issues was not "viewpoint neutral." *Id.* at 393-94.

According to this Court, the "critical question" was "whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* The Court explained that there had been "no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits

to any and all speakers." *Id.* Quoting from its decision in *Cornelius*, the Court observed that

> "[a]though a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

Id. at 394 (quoting *Cornelius*, 473 U.S. at 806).

The Court held that the film series in *Lamb's Chapel* "no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint." *Id.* It then held that " 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' " *Id.* (quoting *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The Court, relying on *Widmar*, easily dismissed the school board's argument that permitting its property to be used for the film series would violate the Establishment Clause. *Id.* at 394-95. The Court noted that

> [t]he showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The district property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and

> any benefit to religion or to the church would have been no more than incidental.

Id. at 395.

3. *Rosenberger* v. *Rector & Visitors of the University of Virginia*

In 1995, the Court addressed a student activities fund created by the University of Virginia, that paid the printing costs of student publications. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. at 824-25. Among the categories of student groups allowed to seek payment to third-party contractors were " 'student news, information, opinion, entertainment, or academic communications media groups.' " *Id.* at 824 (quoting fund's Guidelines). Under the fund's Guidelines, however, "religious activities" were excluded from the fund's support. *Id.* at 825.

A student organization at the University asked the fund to pay the printing costs for its magazine called "Wide Awake: A Christian Perspective at the University of Virginia." *Id.* at 826-27. The University denied the request because Wide Awake was a "religious activity." *Id.* at 827. The student publishers of Wide Awake sued, and the lower courts upheld the University's decision. *Id.* at 827-28.

In this Court, the University argued that its Guidelines were constitutional because they drew "lines based on content, not viewpoint." *Id.* at 830. This Court acknowledged that

> in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between,

> on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 829-30 (citing *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)). The Court concluded, however, that the University's actions were properly classified as viewpoint discrimination. *Id.* at 831.

The Court distinguished between content discrimination and viewpoint discrimination in the context of religious speech:

> As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. . . . We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter,

> resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

Id. at 830-31 (citation omitted). The Court thus held that the University's action was "based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid." *Id.* at 832.

The Court rejected "[t]he dissent's assertion that no viewpoint discrimination occur[ed] because the Guidelines discriminate[d] against an entire class of viewpoints. . . . " *Id.* at 831. The Court also rejected the dissent's assertion that allowing funds to flow to the Christian magazine would violate the Establishment Clause. *Id* at 837-45. The Court observed that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion," *id.* at 839, and held that the University's program was, in fact, "neutral toward religion." *Id.* at 840.

The Court then responded to the dissent's view that the University's discrimination against religious activities was necessary under the Establishment Clause:

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content. The dissent, in fact anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve."

> That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 844-45 (citation omitted). The Court held that such censorship of student speech and thought "was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46.

B. The Decision of the Second Circuit in this Case Authorizes Government Censorship of Religious Speech Based Upon the Religious Viewpoint of the Good News Club and Its Speakers.

The Second Circuit's decision in this case conflicts with this Court's decisions in *Widmar*, *Lamb's Chapel*, and *Rosenberger* and authorizes (if not requires) government officials to censor private speech to filter out views that are "too" religious. In the name of prohibiting "religious instruction" and "worship," the Court of Appeals authorized government officials to root out those views that do not "meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844.

Much like the Center Moriches policy in *Lamb's Chapel*, the Milford policy allows district residents to

> use school facilities for "holding social, civic and recreational meetings and entertainment

> events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public," and otherwise consistent with state law.

202 F.3d at 504 (quoting Milford "Community Use of School Facilities" Policy ¶ 3, *reprinted* in App. to Pet. for Cert., at D1). It is undisputed that the school district allows clubs such as the Boy Scouts, Girl Scouts, and 4-H Club to use their time on school property "to promote the moral and character development of children." Brief for Defendant-Appellee Milford Central School at 9, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). The Good News Club's viewpoint on moral values, however, is that such values are "senseless without Christ." 202 F.3d at 509 (quoting Dep. of Steven Fournier). Thus, the Club attempts to encourage the "moral and character development of children" through Bible lessons, songs, prayer, and proselytizing.

The Second Circuit held that this was "something other than simply teaching moral values," that it did "not involve merely a religious perspective on the secular subject of morality," and that the Club "goes far beyond merely stating its viewpoint." *Id.* at 510. According to the Court of Appeals, the Club's activities were not materially different from "religious worship." *Id.* The Second Circuit thus held "that the Club's activities fall outside the bounds of pure 'moral and character development.' " *Id.* at 511.

The Second Circuit's classification of the Club's activities as unprotected "religious instruction" was exactly the approach rejected by this Court in *Widmar* and *Rosenberger*. In essence, the Court of Appeals followed the *dissents* in those cases, not the law of the majority opinions. Indeed, what happened in this case is precisely the

"specter" the Court feared in *Rosenberger*: Government officials scanned the Good News Club's materials, found that they did not meet the school district's "baseline standard of secular orthodoxy," 515 U.S. at 844, and refused to permit such views to be presented.

As in *Rosenberger*, the school district and the courts below failed to distinguish " 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.' " 515 U.S. at 841 (quoting *Board of Educ. of Westside Community Schs. (Dist. 66)* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)). By refusing to allow the Good News Club to address the "moral and character development of children" from a religious perspective, the Milford school officials censored the Club's viewpoint on moral development. Such censorship was not necessary to obey the Establishment Clause.

As in *Lamb's Chapel*, the Club's meetings "would not have been during school hours, would not have been sponsored by the school, and would have been open to" any child, not just Christian children or Club members. 505 U.S. at 395. As in *Lamb's Chapel*, Milford's "property had repeatedly been used by a wide variety of private organizations." *Id.* Given these facts, "there would have been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and any benefit to religion or to the church would have been no more than incidental." *Id.* Any concern that school-age children might misunderstand the school's neutrality with respect to religion should have been addressed through an appropriate disclaimer by school officials.

Rather than displaying neutrality toward religion, however, the school district's actions demonstrated hostility toward religion. *See Mergens*, 496 U.S. at 248 ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.") (plurality opinion). The Establishment Clause forbids such governmental hostility to religion, just as it forbids governmental endorsement of religion. *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

II. THE DECISION OF THE SECOND CIRCUIT CREATES A SPLIT IN THE CIRCUITS, CAUSING UNNECESSARY CONFUSION AND DIFFICULTY FOR PUBLIC OFFICIALS WHO MUST ROUTINELY ADDRESS REQUESTS TO USE PUBLIC FACILITIES.

The decision of the Second Circuit creates a conflict among the circuits with respect to the application of viewpoint neutrality to the use of public facilities by religious organizations. *Compare Gentala* v. *City of Tucson*, 213 F.3d 1055 (9th Cir. 2000) (holding that rejection of application to city's civic events fund to cover costs of city services for National Day of Prayer event violated Free Speech Clause); *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1281 (10th Cir.) (holding that city's policy prohibiting sectarian instruction and worship in city-owned senior centers violated the First Amendment and that the city's prohibition against the showing of a film about the life of Jesus was viewpoint discrimination), *cert. denied*, 519 U.S. 949 (1996); *Good News/Good Sports*

Club v. *School Dist. of Ladue*, 28 F.3d 1501, 1510 (8th Cir. 1994) (holding that Good News/Good Sports Club could use public school facilities despite the fact that the Good News/Good Sports Club's activities included singing religious songs, Bible reading, and prayer), *cert. denied*, 515 U.S. 1173 (1995), *with Good News Club*, 202 F.3d 502; *Campbell* v. *St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir. 2000) (holding that the school district's rejection of the Louisiana Christian Coalition's request to use school facilities for a "prayer meeting" did not violate the Free Speech Clause). Petitioners have detailed the direct conflicts among the holdings in these cases, Pet. for Cert. 10-16, and the *amici* States need not repeat that analysis here.

What the *amici* States wish to bring to the Court's attention, however, is the difficulty this new conflict in the circuits creates for public school officials and others who oversee public facilities. These officials, most of whom are not lawyers, need clear channel markers if they are to navigate between the Free Speech Clause on one hand, and the Establishment Clause on the other.

In *Widmar*, *Lamb's Chapel*, and *Rosenberger*, this Court set out those markers, by placing certain inquiries beyond their authority. In so doing, the Court clarified (and simplified) the duties of public officials faced with requests from religious organizations to use public facilities. Public officials were required to review the purposes for which their facilities could be used, determine if the religious organization wished to use the facility for one of those purposes, and *then treat the religious organization just like any other group*. The officials were *not* required to distinguish between religious "speech" and religious "worship." *Widmar*, 454 U.S. at 269-70 & n.6. They were

not to evaluate the organization's materials to see if they were sufficiently secular. *Cf. Rosenberger*, 515 U.S. at 845-46. There was to be no endorsement of religion, but neither was there to be any discrimination against religion.

In accordance with these principles, the Attorney General of Alabama issued a set of *Guidelines for Religious Activities in Schools* to public school officials in Alabama. These *Guidelines* address, *inter alia*, the use of public school facilities by private religious organizations:

> • Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, subject to the same limitations placed on non-religious meetings.

App. at 3a. With respect to private baccalaureate services, the *Guidelines* similarly provide:

> • If a school by policy and practice rents out its facilities to private groups, it must rent them out on the same terms and conditions, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.
> • Teachers and school administrators must demonstrate and observe neutrality with regard to private baccalaureate services and school officials may neither encourage nor discourage student attendance at such events.

App. at 4a.

The United States Department of Education has issued a similar set of guidelines entitled *Religious Expression in Public Schools*. Regarding baccalaureate services, the Department of Education guidelines likewise state:

> *Graduation prayer and baccalaureates:* Under current Supreme Court decisions, school officials may not mandate or organize prayer at

> graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.
>
> *Official neutrality regarding religious activity*: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

App. at 8b. Guidelines such as these, that embodied the neutrality commanded by this Court's cases, had garnered broad support across a spectrum of religious traditions and political views.

Under the approach taken by the Second Circuit in this case, the task of public officials becomes far more difficult. Not only must officials determine whether the organization's request is consistent with the purposes for which the public facilities may be used, they must now also ask if the religious organization's activities will be "too" religious. Will the members of the group sing religious songs? Will they pray? Will they read the Bible? Will they proselytize? If they sing and pray, but do not read Scripture or proselytize, must the group be excluded? What if they just sing? What if they just pray? Does the answer change based on the significance of each activity in the group's religious traditions?

These are the kinds of distinctions this Court refused to countenance in *Widmar* and *Rosenberger*, and it appears the same concerns underlie *Lamb's Chapel*. Indeed, in *Widmar*, the Court characterized such distinctions as lacking "intelligible content" and beyond the competence of courts and school officials to administer. *Widmar*, 454 U.S. at 269-70 n.6; *Rosenberger*, 515 U.S. at 845 (quoting *Widmar*). More importantly, the Court stated that "[s]uch inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Widmar*, 454 U.S. at 270 n.6; *Rosenberger*, 515 U.S. at 845 (quoting *Widmar*).

The *amici* States submit that, as this Court stated in *Widmar*, the kinds of inquiry necessitated by the decision of the Second Circuit in this case will impermissibly entangle the State with religion and lead to official hostility toward private religious expression. This hostility is inconsistent with the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment. The *amici* States thus urge the Court to grant the petition for writ of certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings.[3]

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[3] The *amici* States agree with Petitioners that summary disposition would be appropriate in this case. *See* Pet. for Cert. 21; *Mazurek* v. *Armstrong*, 520 U.S. 968, 976 (1997) (*per curiam*) (holding that summary disposition was appropriate where lower court's decision was clearly erroneous and had produced immediate consequences).

CONCLUSION

For the reasons stated above, the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina , Texas, and Virginia as *amici curiae*, respectfully ask the Court to grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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[Seal]

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July 29, 1999

MEMORANDUM

TO: All City and County Superintendents of Education

FROM: Bill Pryor, Attorney General
Michael R. White, General Counsel, State Department of Education

RE: Post *Chandler v. James* – Update Guidelines for Permissible Activities, Graduation Exercises and Baccalaureate Services

A joint memorandum to all superintendents regarding permissible religious activities in public school settings was sent to you on December 8, 1997. On April 13, 1998, you received Guidelines for Graduation Exercises and Baccalaureate Services. Since the decision by the United States Court of Appeals in *Chandler v. James*, we are writing this joint memorandum to update the guidelines based upon current decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals.

The Permanent Injunction issued by Judge DeMent against the DeKalb County school system in the *Chandler v. James* case has been vacated and remanded by the

Eleventh Circuit Court of Appeals. The Court found that "genuinely student-initiated religious speech" may not be suppressed nor restrictions applied "on the time, place, and manner of that speech which exceed those placed on students' secular speech."

These guidelines should enable you to ensure that students can fully exercise their First Amendment rights in an environment that does not conflict with the establishment clause.

GUIDELINES FOR RELIGIOUS ACTIVITIES IN SCHOOLS

Introduction

The following guidelines are issued to provide assistance to public school administrators and teachers. These guidelines are based on the rules reiterated by the Eleventh Circuit Court of Appeals in *Chandler v. James* and prior opinions of the United States Supreme Court. These guidelines are intended to be instructive and not all-inclusive.

Permissible Activities in General

- Students may voluntarily engage in individual or group prayer during non-instructional time or at school-sponsored events. This includes individual or group prayer before or after athletic events. School officials (e.g. coaches) should neither encourage nor discourage individual or group prayer. Organization or direction of a prayer by a school official would not be appropriate.

- Students may voluntarily engage in religious discussions during non-instructional time or at school-sponsored events. Students may speak to and attempt to persuade their peers about religious topics just as they do with regard to political or other topics.
- Students may express religious beliefs in reports, homework, art work, and other written and oral assignments, which should be judged by ordinary academic standards of substance and relevance.
- Private citizens (including students) may distribute religious literature in accordance with all applicable time, place and manner restrictions applicable to the distribution of literature that is unrelated to school curriculum activities.
- Students may display religious messages or symbols on items of clothing (e.g. cross, menorah, Star of David, etc.) to the extent that they may display comparable non-religious messages or symbols on items of clothing. Students also may wear particular attire (e.g. yarmulkes, head scarves, etc.) during the school day or school-sponsored events as part of the students' religious practices consistent with board policies and State law.
- Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, subject to the same limitations placed on non-religious meetings.
- Students in secondary schools may have announcements of meetings of a religious nature conveyed in the same manner that announcements are made for meetings of other non-religious groups (e.g. public address system, school newspaper, etc.).
- Teachers may teach about religion, including the Bible and other scripture, provided that such teaching concerns the history of religion, comparative religions,

the Bible (or other scripture) as literature, and/or the role of religion in the history of the United States. The use of religious symbols (e.g. cross, menorah, symbols of Native American religions) is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious subject being taught.

- A fixture or symbol that is traditionally associated with a particular religion (e.g. nativity scene, menorah, etc.) may be included as a "prop" in a school holiday production to the same degree that non-religious props are used in school productions, provided such symbols are displayed as an example of the cultural and religious heritage of the holiday.
- Traditional holiday music may be included in school productions (e.g. choral events, band activities, etc.) in keeping with the cultural or religious heritage of the holiday.

Special Considerations for Commencement/Graduation

Baccalaureate Services

- If a school by policy and practice rents out its facilities to private groups, it must rent them out on the same terms and conditions, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.
- Teachers and school administrators must demonstrate and observe neutrality with regard to private baccalaureate services and school officials may neither encourage nor discourage student attendance at such events.
- Teachers and school administrators may attend such functions in their individual capacities.

- Baccalaureate services are to be announced or advertised in the same manner as other non-religious meetings, such as notices in the school newspaper or use of the public address system and bulletin boards.

Commencement Exercises

- Student initiated religious speech is permitted; however, school officials are not to encourage, organize, or direct such speech.
- Regularly scheduled student speakers (e.g., valedictorian, salutatorian class President) may make religious comments during their speeches. School officials are not to encourage or direct such speech.
- Valedictory and other student speakers may refer to Biblical passages.
- Student speakers may express thanksgiving to God during the course of their speeches.
- Religious persons and/or organizations are entitled to advertise in school commencement programs/directories on the same terms as other persons or community organizations.

The intent of these guidelines is to prescribe a course of study, conduct and related activities that do not prescribe directly or indirectly a single religion, belief or observance and that are consistent with the prevailing decisions by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Any questions regarding the above guidelines or conduct that is not specifically detailed above should be directed to the Office of the Attorney General, Bill Pryor, or the General Counsel for the Department of Education, Mike White.

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

" . . . Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools. . . . For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."

President Clinton
May 30, 1998

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on *Religious Expression in Public Schools* in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that

had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (*Chandler v. James*) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in *Boerne v. Flores* declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example, begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (http://www.ed.gov) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America – that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

s/ Richard W. Riley
Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at

the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that

they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media – including the public address system, the school newspaper, and the

school bulletin board – to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a non-discriminatory matter [sic]. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.

Revised May 1998

List of organizations that can answer questions on religious expression in public schools

Religious Action Center of Reform Judaism
Name: Rabbi David Saperstein
Address: 2027 Massachusetts Ave., NW,
Washington, DC 20036
Phone: (202) 387-2800
Fax: (202) 667-9070
Web site: http://www.rj.org/rac/

American Association of School Administrators
Name: Andrew Rotherham
Address: 1801 N. Moore St., Arlington, VA 22209
Phone: (703) 528-0700
Fax: (703) 528-2146
Web site: http://www.aasa.org

American Jewish Congress
Name: Marc Stern
Address: 15 East 84th Street, New York, NY 10028
Phone: (212) 360-1545
Fax: (212) 861-7056

National PTA
Name: Maribeth Oakes
Address: 1090 Vermont Ave., NW, Suite 1200,
Washington, DC 20005
Phone: (202) 289-6790
Fax: (202) 289-6791
Web site: http://www.pta.org

Christian Legal Society
Name: Steven McFarland
Address: 4208 Evergreen Lane, #222,
Annandale, VA 22003
Phone: (703) 642-1070
Fax: (703) 642-1075
Web site: http://www.clsnet.com

National Association of Evangelicals
Name: Forest Montgomery
Address: 1023 15th Street, NW #500,
Washington, DC 20005
Phone: (202) 789-1011
Fax: (202) 842-0392
Web site: http://www.nae.net

National School Boards Association
Name: Laurie Westley
Address: 1680 Duke Street, Alexandria, VA 22314
Phone: (703) 838-6703
Fax: (703) 548-5613
Web site: http://www.nsba.org

Freedom Forum
Name: Charles Haynes
Address: 1101 Wilson Blvd, Arlington, VA 22209
Phone: (703) 528-0800
Fax: (703) 284-2879
Web site: http://www.freedomforum.org

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No. 99-2036

IN THE
SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Joint Appendix

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Petition for Writ of Certiorari Filed June 16, 2000
Certiorari Granted October 10, 2000

December 1, 2000

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4. *Good News Club, et al. v. Milford Central*

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1 Typographical errors in the original documents have not been corrected.

2 Documents reproduced as appendices to the Petition for Writ of Certiorari are not reproduced herein pursuant to Rule 26.1. The respective location of these documents in the Appendix to the Petition is noted for the convenience of the Court and counsel.

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14. Exhibit D to McGruder Affidavit (Exhibit 2 to Defendant's Motion for Summary Judgment) - Letter from Thomas Marcelle to Norman H. Gross, Dated January 17, 1997 . . . J1-J2

15. Notice of Cross-Motion, by Plaintiffs (Petitioners Good News Club, *et al.*), for an Order Granting Summary Judgment, Dated July 29, 1998 . . K1-K2

16. Plaintiffs' (Petitioners Good News Club, *et al.*) Rule 7(f) Statement of

Undisputed Facts), dated July 29, 1998 . . . . . Pet. Appx., E1

17. Plaintiff's (Petitioners') Response to Defendant's (Respondent's) Rule 7(f) Statement, dated July 29, 1998 . . . . . Pet. Appx., G1

18. Affidavit of Steve Fournier, dated July 28, 1998, in Opposition to Defendant's (Respondent's) Motion for Summary Judgment and in Support of Plaintiffs' (Petitioners') Cross-Motion for Summary Judgment, ... Pet. Appx., H1

19. Affidavit of Darleen Fournier, Sworn to April 4, 1997, in Opposition to Defendant's (Respondent's) Motion for Summary Judgment and in Support of Plaintiffs' (Petitioners') Cross-Motion for Summary Judgment, ... L1-L2

20. Affirmation of Thomas Marcelle, Dated July 27, 1998, for Plaintiffs, in Opposition to Defendant's (Respondent's) Motion for Summary Judgment and in Support of Plaintiffs' (Petitioners') Cross-Motion for Summary Judgment M1-M6

21. Plaintiffs' (Petitioners') Exhibit 1, Milford Central School's Community Use of Facilities Policy (Defendant's (Respondent's) Exhibit 3) . . . . . Pet. Appx., D1

22. Plaintiffs' (Petitioners') Exhibit 10, Deposition Testimony of Peter Livshin, Dated January 28, 1998 (Defendant's (Respondent's) Exhibit 10) (signing stipulation, attestation and exhibits omitted) N1-N20

23. Plaintiffs' (Petitioners') Exhibit 11, Decision of Honorable Thomas J. McAvoy, Dated April 17, 1997, Granting Plaintiff's Motion for a Preliminary Injunction (Defendant's (Respondent's) Exhibit 7)(reporter's certification omitted) O1-O11

24. Plaintiffs' (Petitioners') Exhibit 12, Deposition Testimony of Stephen Fournier and Darleen Fournier, Dated January 28, 1998 (Defendant's (Respondent's) Exhibit 9)(signing stipulation, index and reporter's certification omitted) P1-P114

25. Reply Affidavit of Frank W. Miller, Sworn to July 31, 1998, in

Opposition to Plaintiffs' (Petitioners')
Cross-Motion and in Further Support
of Defendant's (Respondent's) Motion
. . . . . Q1-Q10

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Court of Appeals Docket #: 98-9494
Nsuit: 3440 CIVIL RIGHTS-Other
Good News Club, et al v. Milford Central Scho
Appeal From: U.S. District Court NDNY

- -

Lower court information:
District: 0206-03: 97-cv-302
Trial Judge: Thomas J. McAvoy, Chief Judge
Magistrate Judge: Gary L. Sharpe
Date Filed: 03/07/97
Date order/judgment: 10/23/98
Date NOA filed: 10/30/98

- -

Fee status: Paid

- -

Prior cases:
None
Current cases:
None

- -

Panel Assignment:
Panel: RJM DJ FIP 1705 :CA2 6/23/99
am
Date of decision: 2/3/00

11/9/98 Copy of notice of appeal and district court docket entries on behalf of Appellant Good News Club, Appellant

Andrea Fournier, Appellant Darleen Fournier filed.

11/9/98 Per the district court docket sheet copy of receipt re: payment of docketing fee filed on behalf of Appellant Good News Club, Appellant Andrea Fournier, Appellant Darleen Fournier receipt #: 38480.

11/25/98 Appellants Good News Club, Andrea Fournier, and Darleen Fournier motion to extend time to File Appellant's Brief FILED (w/pfs).

12/1/98 Order FILED GRANTING motion for extended time by Appellant Good News Club, Andrea Fournier, Darleen Fournier, endorsed on motion form dated 11/25/98. Extended appellant's brief due date is 1/21/99. Extended appellee's brief due date is 2/22/99. Extended argument week as early as 4/5/99.

12/3/98 Record on appeal index in lieu of record filed.

1/21/99 Appellant's Good News Club, Andrea Fournier, and Darleen Fournier brief FILED with proof of service. (cv79)

1/21/99 Appellant's Good News Club, Andrea Fournier, and Darleen Fournier joint appendix filed w/pfs.

2/11/99 Letter endorsed by Thomas J. Marcelle, Esq., and Frank W. Miller, Esq., indicating that they consent to the filing of an amicus curiae brief by the New York State School Boards Association, Inc., filed.

2/11/99 New party added: New York State School Boards Association.

2/22/99 Appellee Milford Central School brief filed with proof of service.

2/22/99 Amicus Curiae New York State School brief filed with proof of service.

3/8/99 Appellants Good News Club, Andrea Fournier, and Darleen Fournier reply brief filed with proof of service.

5/11/99 Set for argument on 6/23/99.

6/23/99 Case heard before MINER, JACOBS, PARKER C.JJ. (TAPE: #307+308)

2/3/00 Judgment of the district court is AFFIRMED by published signed

opinion filed.

2/3/00 Judge (DJ) DISSENTING in a separate opinion filed.

2/3/00 Judgment filed. [Entry Date: 2/3/00]

2/17/00 Appellant Good News Club, Appellant Andrea Fournier, Appellant Darleen Fournier Petition for rehearing, petition for rehearing en banc with proof of service filed.

3/21/00 Order FILED DENYING petition for REHEARING by Appellant Good News Club, Andrea Fournier, Darleen Fournier, endorsed on motion dated 2/17/00. DENYING petition for rehearing in banc by Appellant Good News Club, Andrea Fournier, Darleen Fournier, endorsed on motion dated 2/17/00. (In Banc panel for the court BJM)

3/28/00 Judgment MANDATE ISSUED.

6/23/00 Notice of filing petition for writ of certiorari for Appellant Good News Club, Appellant Andrea Fournier, Appellant Darleen Fournier dated June 21, 2000 filed. Supreme Ct#:

99-2036.

10/16/00 Letter dated 10/10/00 from the Supreme Court advising of order GRANTING petition for writ of certiorari by Appellant Good News Club, Andrea Fournier, Darleen Fournier, endorsed on motion form date 6/23/00 filed. (Supreme Court # 99-2036)

3:97cv302
The Good News Club, et al v. Milford Central

U.S. District Court
Northern District of New York (Binghamton)
CIVIL DOCKET FOR CASE #: 97-CV-302

The Good News Club, et al v. Milford Central
Filed: 03/07/97
Assigned to: Chief Judge Thomas J. McAvoy
Referred to: Magistrate Judge Gary L. Sharpe

Cause: 42:1983 Civil Rights Act

3/7/97	COMPLAINT filed
3/7/97	SUMMONS(ES) issued for Milford Central
3/13/97	MOTION for Show Cause Hearing by The Good News Club, Andrea Fournier, Darleen Fournier Show Cause Hearing for Motion returnable before Judge/Mag. Judge: Thomas J. McAvoy
3/13/97	MEMORANDUM by The Good News Club, Andrea Fournier, Darleen Fournier in support of motion

3/14/97	Pltfs MEMORANDUM in support of Order to Show Cause
3/14/97	ORDER 3/13/97 denying motion Show Cause Hearing signed by Chief Judge Thomas J. McAvoy
3/14/97	LETTER to Judge McAvoy from Thomas Marcelle, Esq. dated 3/14/97 RE: Plaintiffs withdraw their request for an order to show cause that was filed on 3/10/97: Plaintiffs will bring their motion for injunctive relief by regular notice of motion returnable on 4/14/97 in Albany.
3/14/97	MOTION by The Good News Club, Andrea Fournier, Darleen Fournier for Preliminary Injunction, Hearing set for 10:00 4/14/97, Response Deadline 3/31/97, Reply to Response Deadline 4/7/97 Motion returnable before Judge/Mag. Judge: McAvoy
3/14/97	AFFIDAVIT by Thomas Marcelle, Esq. for The Good News Club, Andrea Fournier, Darleen Fournier Re: In support of motion for Preliminary Injunction
3/14/97	MEMORANDUM OF LAW by The Good

	News Club, Andrea Fournier, Darleen Fournier in support of motion for Preliminary Injunction
4/3/97	DEFT'S AFFIDAVIT in opposition to Pltfs' motion for Preliminary Injunction
4/3/97	DEFT'S AFFIDAVIT IN OPPOSITION to Pltfs' motion for Preliminary Injunction
4/3/97	DEFT'S MEMORANDUM in opposition to Pltfs' motion for Preliminary Injunction
4/4/97	ANSWER to Complaint by Milford Central (Attorney Thomas H. Kutzer)
4/4/97	ORDER extending Deft's time to file a Response to Motion reset to 4/2/97 for motion for Preliminary Injunction (signed by Chief Judge Thomas J. McAvoy on 4/4/97)
4/7/97	REPLY Memorandum by The Good News Club, Andrea Fournier, Darleen Fournier to Defts response in opposition to Pltfs motion for Preliminary Injunction

4/15/97	MINUTES OF 4/14/97 MOTION HEARING: Pltf motion for preliminary injunction -- GRANTED; Bond set at $25,000; APP: Thomas J. Marcelle, Esq., for Pltf; Norman Gross, Esq., for Deft
4/18/97	TRANSCRIPT OF PROCEEDINGS (Motion Decision) filed for dates of 4/14/97 before the Hon. Thomas J. McAvoy, Chief U.S. District Court Judge.
4/29/97	AFFIDAVIT by Thomas Marcelle, Esq. on behalf of The Good News Club, Andrea Fournier, Darleen Fournier w/undertaking by plaintiffs for $25,000 Re: motion for Preliminary injunction
4/29/97	ORDER granting motion for Preliminary Injunction, allowing plaintiffs to use Milford Central School cafeteria to conduct its meetings and ordering that obligation to post undertaking in the amount of $25,000 has been fulfilled by plaintiffs. (signed by Chief Judge Thomas J. McAvoy)
5/7/97	AFFIDAVIT of Service by The Good News Club, Andrea Fournier, Darleen

Fournier Re: complaint

5/9/97 MOTION by The Good News Club, Andrea Fournier, Darleen Fournier for Reconsideration of order , Hearing set for 10:00 6/9/97 Motion returnable before Judge/Mag. Judge: Thomas J. McAvoy

5/9/97 MEMORANDUM by The Good News Club, Andrea Fournier, Darleen Fournier in support of order

5/15/97 Minute entry: MOTION CALENDAR HELD 5/12/97 Court Reporter/ECRO: H. Santspree; Appear: None; Pltf's motion for preliminary injunction MOOT; addressed by Chief Judge McAvoy

6/9/97 Motion hearing re: pltf's motion for Reconsideration of order held before Chief Judge McAvoy

6/24/97 Minute entry: 6/19/97 Rule 16 Conf. w/MJ Hurd. Parties awaiting decision from 2nd Circuit in a similar action that may effect this action. CM0 to be issued. App. Thomas Marcelle for pltfs, David Larrison & Norman Gross for deft

8/11/97 Motion hearing re: pltf's motion for Reconsideration of order held

8/12/97 Minute entry: MOTION CALENDAR HELD 8/11/97 BEFORE CHIEF JUDGE MCAVOY IN ALBANY: App: None; CR: T. Berical; LC/AW. Pltf's motion for Reconsideration of order - TAKEN ON SUBMIT.

9/9/97 ORDER 9/3/97 granting Pltf's motion for a preliminary injunction, modifying by striking the last two paragraphs of order requiring pltfs post a bond in the amount of $25,000 (signed by Chief Judge Thomas J. McAvoy)

11/19/97 ORDER, case is reassigned from M/J Hurd to M/J Sharpe (signed on 11/19/97 by Chief Judge Thomas J. McAvoy)

3/30/98 Minute entry of 3/30/98 Pretrial Conference held before Mag/Judge Sharpe, in Binghamton; App: T. Marcelle, Esq., for Pltf; F. Miller, Esq., for Deft; Parties discuss impact of Bronx case upon this action; Deadlines extended; Order to be issued

8/3/98 MOTION by Frank W. Miller, Esq. for Milford Central to Dismiss the Complaint. Hearing set for 10:00 a.m. on 9/14/98, at Albany, NY. Response Deadline 8/31/98. Reply to Response Deadline 9/7/98. Motion returnable before Judge McAvoy

8/3/98 AFFIDAVIT of Frank W. Miller, Esq. in Support Re: motion to Dismiss the Complaint. Exhibits 1-10 are attached in further support.

8/3/98 Rule 7.1(f) Statement by Defendant in Support of motion to Dismiss the Complaint filed by The Good News Club

8/3/98 MEMORANDUM with Proposed Order by Frank W. Miller, Esq. for Milford Central in support of motion to Dismiss the Complaint

8/3/98 CROSS MOTION by Thomas Marcelle, Esq. for The Good News Club, Andrea Fournier, and Darleen Fournier for Summary Judgment, for leave to use its facilities to conduct meetings, for costs, disbursements and Attorney Fees. Attached are the following documents: Plaintiffs' Rule 7(f)

Statement; Response to defendant's Rule (f) Statement; Affidavit of Steve Fournier; Affidavit of Darleen Fournier; Affidavit of Paula Kiser; Affirmation of Thomas Marcelle, Esq.; and Exhibits 1-11. Hearing set for 10:00 a.m. on 9/14/98, at Albany, NY.

8/3/98 VOLUME 2: Exhibit 12 in Support of Cross Motion by Pltfs for summary judgment.

8/3/98 MEMORANDUM by Thomas Marcelle, Esq. for The Good News Club, Andrea Fournier, Darleen Fournier in support of cross motion for Summary Judgment, cross motion for leave to use its facilities to conduct meetings, cross motion for costs, disbursements and Attorney Fees

8/3/98 MEMORANDUM by Thomas Marcelle, Esq. for The Good News Club, Andrea Fournier, Darleen Fournier in opposition to motion to Dismiss the Complaint

8/3/98 RESPONSE by Frank Miller, Esq. for Milford Central in opposition to cross motion for Summary Judgment, cross motion for leave to use its facilities to

conduct meetings, cross motion for costs, disbursements and Attorney Fees

8/3/98 REPLY AFFIDAVIT by Frank Miller, Esq. for Milford Central to response to motion to Dismiss the Complaint

8/3/98 MEMORANDUM by Frank Miller, Esq. for Milford Central in opposition to cross motion for Summary Judgment, cross motion for leave to use its facilities to conduct meetings, cross motion for costs, disbursements and Attorney Fees. Defendant's REPLY MEMO OF LAW in further Support of summary judgment.

9/14/98 Motion hearing held re: cross motion for Summary Judgment, leave to use its facilities to conduct meetings, and for costs, disbursements and Attorney Fees; and motion to Dismiss the Complaint

9/15/98 Minute entry of 9/14/98 Motion Calendar before Chief Judge McAvoy; App: None; LC: A. Reiss; Court Reporter: B. Buckley; Pltfs' cross motion for Summary Judgment, Leave to use its facilities to conduct

meetings, and for costs, disbursements and Attorney Fees and Deft's motion to Dismiss the Complaint - TAKEN ON SUBMIT

10/6/98 STIPULATION by parties that the case can be removed from the trial calendar based-on the pending motions for summary judgment

10/23/98 ORDER denying Pltf's cross motion for Summary Judgment, granting Deft's motion to Dismiss the Complaint and Vacating order granting Preliminary Injunction (signed by Chief Judge Thomas J. McAvoy on 10/23/98)

10/23/98 JUDGMENT for Milford Central against The Good News Club, Andrea Fournier, Darleen Fournier Date Served: 10/23/98

10/30/98 NOTICE OF APPEAL by Thomas Marcelle, Esq., for The Good News Club, Andrea Fournier, Darleen Fournier. Appealing from the Order by Judge McAvoy granting defendant's motion for summary judgment and denying plaintiff's cross motion for summary judgment entered on 10/23/98. FILING FEE $ 105.00

RECEIPT # 38480 index to the record on appeal due on 11/29/98

11/6/98 Notice of appeal and certified copy of docket to USCA re: appeal by Darleen Fournier, Andrea Fournier, The Good News Club (parties noticed)

THE UNITED STATES DISTRICT COURT
FOR
THE NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

V. Civil Action No.
Complaint

MILFORD CENTRAL SCHOOL

FOR A COMPLAINT, THE PLAINTIFF ALLEGES:

JURISDICTION

1. The Good News Club, Andrea Fournier, and Darlene Fournier bring a civil rights action for injunctive relief pursuant to 42 USC §1983 and 42 USC §2000BB.

2. Plaintiffs invoke the jurisdiction of the Court pursuant to 28 USC § 1331.

PARTIES

3. The Good News Club (hereinafter "GNC") is an unincorporated association with its principal place of business located in the County of Otsego, the State of New York.

4. Andrea Fournier is a member of the GNC and resides in the County of Otsego, the State of New York.

5. Darleen Fournier is the mother of Andrea Fournier and is in charge of the organization of the GNC; Ms. Fournier resides in the County of Otsego, the State of New York.

6. The Defendant, Milford Central School (herein after "Milford"), has its principal place of business located in the County of Oneonta, the State of New York.

BACKGROUND

7. GNC is a youth organization that promotes and teaches children Christian values.

8. GNC is non exclusive and is open to any child between the ages 5 and 12.

9. GNC is not affiliated with any church and does not teach any particular Christian sect's doctrine or theology.

10. At GNC meetings, the children hear a Bible story (in a style that has application to their young lives), play games, learn scripture, and sing songs.

11. On or about September 22, 1996, GNC

submitted a request to use the Milford School cafeteria every Tuesday during the School year between the hours of 3:00 PM to 4:00 p.m.

12. The request was submitted by Ms. Darleen Fournier as the representative in charge of the organization.

13. On or about September 22, 1996, Dr. Robert McGruder, superintendent of Milford Central School, called Ms. Fournier and informed her that GNC would not be permitted to use school facilities because it was school policy that "religious groups could not use the school building."

14. In a letter dated October 3, 1996, Dr. McGruder formally deny GNC's request to use school facilities because GNC's acivities were "the equivalent of [sic] religious worship, which is prohibited under [Milfcrd School] policy."

15. Milford allows the Girls Scouts to use school facilities.

16. Milford allows the Boys Scouts to use school facilities.

17. Milford allows Ostego County 4-H to use school facilities.

18. Milford allows a local little league to use school

facilities.

19. Upon information and belief, in its entire history, Milford has never refused the use of school facilities to any youth organization except plaintiff.

First Cause of Action -- Violation of the Freedom of Speech

20. Plaintiff repeats and realleges ¶l- ¶19 as if fully set forth herein.

21. By denying use of school facilities to GNC because of the content and nature of its speech, defendant violated plaintiff's Constitutional right to Freedom of Speech.

Second Cause of Action -- Violation of RFRA

22. Plaintiff repeats and realleges ¶l- ¶19 as if fully set forth herein.

23. By denying use of school facilities to GNC because of the content and nature of its speech and the religious value which it promotes, defendant has discriminated against plaintiff and has violated plaintiff's rights under the Religious Freedom Restoration Act.

Third Cause of Action -- Violation of the Equal Protection Clause

24. Plaintiff repeats and realleges ¶l- ¶19 as if fully set forth herein.

25. By denying use of school facilities to GNC because of the content and nature of its speech and its religious identity, defendant has discriminated against plaintiff and has violated plaintiffs rights under the Equal Protection clause.

WHEREFORE, the Good News Club asks this honorable court to issue an injunction ordering Milford Central School to permit GNC to use its facilities to conduct its meetings, to cease and desist from further violating GNC's the constitutional rights and rights under the Religious Freedom Restoration Act, and to paid GNC's attorney's fees together with the cost of this litigation; GNC also requests further and different relief that the court deems just, proper, and necessary to remedy the harm that it has suffered.

Darleen Fournier, being duly sworn, sates she has read the foregoing complaint and the same is true to her own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters she believes them to be true.

/s/
Darleen Fournier

Submitted this 6th day of March, 1997.

/s/
Thomas Marcelle
Attorney for Plaintiffs
71 Devonshire Dr.
Slingerlands, NY 12169
Phone: (518) 475-0806

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER,

Plaintiffs,

ANSWER

vs.

Civil Action No.
97-CV-0302
TJM/DNH

MILFORD CENTRAL SCHOOL,

Defendant.

Defendant, Milford Central School District, named herein as Milford Central School, by their attorneys, Ferrara, Fiorenza, Larrison, Barrett &; Reitz, P.C., as and for an Answer to Plaintiffs' Complaint:

1. ADMITS the allegations contained in Paragraphs "1", "2", "11", "15" and "17" in the Complaint.

2. LACKS SUFFICIENT INFORMATION TO FORM A BELIEF as to the allegations contained in Paragraphs "3", "4", "5", "7", "8", "9", "10", "12", and "19" of the Complaint, and thus DENIES them.

3. DENIES the allegations contained in Paragraphs "21", "23" and "25" of the Complaint.

4. DENIES so much of Paragraph "6" that alleges Defendant, Milford Central School District (named here as "Milford Central School") is located in a County named Oneonta, and AFFIRMATIVELY STATES that it is located in Otsego County.

5. ADMITS so much of Paragraph "13" that alleges on or about September 22, 1996, Dr. McGruder had a telephone conversation with Ms. Fournier, and DENIES the remainder of that Paragraph.

6. ADMITS so much of Paragraph "14" that alleges on or about October 3, 1996, Dr. McGruder forwarded a letter to Rev. S.D. Fournier, and AFFIRMATIVELY STATES the substance of the letter speaks for itself.

7. ADMITS so much of Paragraph "16" that alleges Defendant allows the Boy Scouts to use a part of a school facility for its organizational meeting with leaders' workshop, AFFIRMATIVELY STATES that in November 1996 and, January 1997, the Cub Scouts were allowed to use the District's facilities, and DENIES the remainder of that Paragraph.

8. ADMITS so much of Paragraph "18" that

alleges Defendant allows the local little league program to use a part of its facility for its registration night, and DENIES the implication that the use is other than this annual registration.

9. REPEATS AND REALLEGES the responses previously stated to the allegations in Paragraphs "20", "22" and "24" of the Complaint.

10. DENIES each and every other allegation not herein specifically admitted, controverted or denied.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

11. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

12. The pleading is insufficient and is not in the form prescribed, and, therefore, does not state a cause of action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

13. The Complaint fails to state specific acts of conduct attributable to the Defendant which give

rise to liability pursuant to 42 U.S.C. §1983.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

14. Plaintiff has failed to allege a custom or policy pursuant to 42 U.S.C. §1983.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

15. Defendant's concerns with regard to the Establishment Clause of the U.S. Constitution is in furtherance of a compelling governmental interest pursuant to the Religious Freedom Restoration Act (42 U.S.C. §2000bb-1).

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

16. The allegations in the Plaintiffs' Complaint do not rise to a level of constitutional magnitude: The Court, thus, lacks subject matter jurisdiction.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

17. The Defendant has created a limited public forum with reasonable regulations on use, related to legitimate governmental concerns, regarding children of impressionable age and violations of the

Establishment Clause of the U.S. Constitution.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE, THIS DEFENDANT ALLEGES:

18. The allowance of use of the school building to the Plaintiffs by the Defendant would violate the Establishment Clause of the United States Constitution.

WHEREFORE, the Defendant, Milford Central School, demands judgment dismissing Complaint, together with reasonable counsel fees and costs incurred in this action, and for such relief as is just and proper.

Dated: April 3, 1997

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.
Thomas H. Kutzer, Esq., of Counsel
Bar Roll Number 103404
Attorneys for Defendant
Office & P.O. Address
5010 Campuswood Drive
East Syracuse, New York 13057
(315) 437-7600

TO: THOMAS MARCELLE, ESQ.

Attorney for the Plaintiffs
P.O. Box and Office Address
71 Devonshire Drive
Slingerlands, New York 12159

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB,
ANDREA FOURNIER
& DARLEEN FOURNIER

Plaintiffs,

v.

MILFORD CENTRAL SCHOOL.
Defendants.

NOTICE OF MOTION

Civil Action No.:
97-CV-0307
(TJM/GLS)

MOTION BY: FERRARA, FIORENZA.
LARRISON, BARRETT & REITZ.
P.C.
Frank W. Miller. Esq.. of Counsel
Attorneys for Milford Central
School District

MOTION
RETURNABLE: September 14, 1998
United States District court
Northern District of New York
James T. Foley U.S. Courthouse
Room 222
445 Broadway
Albany, New York

10:00 a.m., or as soon thereafter as counsel may be heard.

OBJECT OF MOTION: Motion for Summary Judgment Pursuant to F.R.C.P. Rule 56

RELIEF DEMANDED: Summary Judgment, Dismissing the Plaintiffs' Complaint pursuant to F.R.C.P. Rule 56

PAPERS IN SUPPORT OF MOTION: Affidavit of Frank W. Miller, Esq. sworn to July 2. 1998, together with all attached Exhibits; Defendant's Statement of Material Facts Over Which There is No Genuine Dispute; Pursuant to Rule 7(f) Defendant's Memorandum of Law in Support of Motion

GROUNDS FOR RELIEF DEMANDED: There are no issues of fact to require a trial.

Dated: July 31, 1998
East Syracuse, New York

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.
By: /s/
Frank W. Miller, Esq., of Counsel
Bar Roll No.: 102203
Attorneys for Defendant
Office and P.O. Address
5010 Campuswood Drive
East Syracuse, New York 13057
(315) 437-7600
Fax (315) 437-7744

TO: Thomas Marcelle, Esq.
71 Devonshire Drive
Slingerlands, New York 12159
(518) 475-0806
Fax (518) 475- 1083

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

Plaintiffs,

v.

MILFORD CENTRAL SCHOOL,

Defendants.

AFFIDAVIT

Civil Action No.: 97-CV-0302 (TJM/GLS)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

I, Frank W. Miller, being duly sworn depose and say:

1. I am an attorney at law admitted to practice law in the State of New York, am duly admitted to practice law in the Northern District of New York and my bar roll number is 102203.

2. I am a partner in the firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for Defendant Milford Central School District (the

"Defendant") in the above-referenced matter. I am familiar with the facts and circumstances stated herein. I have handled this matter since joining the firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. in October, 1997.

3. I make this Affidavit in support of a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the Plaintiffs' action in its entirety upon the grounds that there are no triable issues of fact to warrant trial in this action and that Plaintiffs' claims lack merit.

4. On or about September 22, 1996, Dr. Robert C. McGruder, Interim Superintendent of Schools of the District [hereinafter, "Superintendent McGruder"], received a standard District Use of Facilities Request Form from Plaintiff Darleen Fournier on behalf of Plaintiffs. (Exhibit "1") The Plaintiffs' stated purpose for use of the Defendant's school building was for "singing songs, hearing Bible lesson(s) and memorizing Scripture. Superintendent McGruder received another request on behalf of Plaintiffs from Reverend Steven D. Fournier of the Milford Central Community Bible Church, dated September 26, 1996. (Exhibit "2", ¶6)

5. On August 26, 1992, in accordance with §414 of the New York State Education Law.

the Defendant adopted District Policy Number 1500 entitled "Community Use of School Facilities" which limits the use of school premises to those specifically enumerated within the Policy. (Exhibit "3") The Policy provides, in relevant part, that:

> [s]chool premises shall not be used by any individual or organization for religious purposes.

6. On or about October 3, 1996, Superintendent McGruder denied Plaintiffs' requests to use school premises "identifying the Plaintiffs' proposed use of school facilities as the equivalent of religious worship rather than the expression of religious views on non-secular subject matter." (Exhibit "2", and Exhibit "A" thereto)

7. On or about January 7, 1997, Superintendent McGruder received a letter from Plaintiffs' counsel, Thomas Marcelle, Esq., alleging that the Defendant's denial of the use of its facilities for the teaching of Bible lessons to elementary students violated Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution, as well as their rights under the Religious Freedom Restoration Act. (Exhibit "2", and Exhibit "B" thereto)

8. On January 10, 1997, the Defendant

requested that the Plaintiffs furnish the Defendant with written materials which would be used by the Plaintiffs as part of their lessons, a description of their proposed activities, as well as an indication of who would be leading or supervising these activities. (Exhibit "2", and Exhibit "C" thereto)

9. On or about January 17, 1997, the Defendant received a general description of the activities of Plaintiffs.

> The Club's activities are run by Ms. Darlene Fournier. The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse[,] the child receives a treat. After attendance, the Club sings songs. Next[,] Club members engage in games that involve, inter alia, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization. (Exhibit 2, and Exhibit "D" thereto)

10. In addition, on or about January 23, 1997, the Plaintiffs forwarded to the Defendant various materials distributed by the Plaintiffs to

children during their sessions. Those materials included, inter alia, [a] a Good News Club invitation printed on a 3" x 3" index card; [b] a parental permission slip; [c] a sample puzzle; and [d] the "Daily Bread," a booklet used by the Good News Club for story telling. Further, the letter accompanying these materials stated that the children participating in the Good News Club are First through Sixth graders.

11. After reviewing the materials submitted by the Plaintiffs, the Defendant concluded that the kind of activities proposed were not discussions of non-secular subjects such as child rearing or the development of character and morals from a religious perspective but were the equivalent of religious instruction. (Exhibit "2", ¶13, and Exhibit "E" thereto)

12. On or about February 13, 1997, the Defendant wrote to the Plaintiffs asking that they consider postponing any litigation concerning the instant dispute until the United States Court of Appeals for the Second Circuit decided a case concerning a similar issue. That case, entitled Bronx Household of Faith v. Community School District No. 10, 95 CV 5501 [S.D.N.Y. 1996), involved the question of whether a school district can be required to allow the use of its facilities for the purpose of religious worship. In its decision, the lower court ruled in favor of the Defendant

District finding that it was not required to make its facilities available for such a purpose. (Exhibit "2", and Exhibit "F" thereto, containing the lower court's ruling)

13. On or about February 21, 1997, the Plaintiffs submitted to the Defendant a counterproposal, asking that the Plaintiffs be permitted to use the Defendant's facilities during the pendency of the Appeal of the Bronx Household case. The Plaintiffs agreed, that:

> [i]f the Second Circuit should affirm the decision, the Good News Club will immediately cease using the facilities. The Good News Club will review the decision and make a determination if it desires to bring legal action. If legal action is brought, the Good News Club agrees not to use to fact that the School District allowed it to use the facilities in any pleadings, motions, papers, argument, hearing, trial, or in any matter for any purpose in litigation. (Exhibit "2", and Exhibit "G" thereto)

14. On February 26, 1997, the Defendant's Board of Education adopted a resolution denying the Plaintiffs' request to use it facilities during the pendency of Bronx Household. This determination

was communicated to the Plaintiffs, by letter dated February 28, 1997 (Exhibit "2", and Exhibit "H" thereto), and again by letter dated March 3, 1997 (Exhibit "2", and Exhibit "I" thereto).

15. On March 7, 1997, the Plaintiffs filed a Summons and Complaint with this Honorable Court, pursuant to 42 U.S.C. §§1983 and 2000BB, alleging that the Defendant violated Plaintiffs' Constitutional right to Free Speech under the First Amendment; that the Defendant discriminated against the Plaintiffs in violation of their rights under the Equal Protection Clause; and, further, that the Defendant violated the Religious Freedom Restoration Act of 1993. (Exhibit "4")

16. On or about March 14, 1997, the Plaintiffs filed a Motion for a Preliminary Injunction against the Defendant to require the Defendant to allow the Plaintiffs to use its facilities to conduct its meetings. (Exhibit "5")

17. On or about April 3, 1997, the Defendant filed its Answer to Plaintiffs' Complaint. (Exhibit "6")

18. On April 14, 1997, oral argument was had on the Plaintiffs' Motion for a Preliminary Injunction before the Honorable Thomas J. McAvoy.

19. On April 17, 1997, Judge McAvoy granted the Plaintiffs' Motion permitting the Plaintiffs to use the Defendant's facilities pending the resolution of the case at bar. (Exhibit "7")

20. On September 15, 1997, Bronx Household was decided in favor of the Defendant School District. Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 [2d Cir. 1997).

21. There has been pre-trial discovery in this case. Annexed hereto as Exhibit "8" are examples of various songs sung with children who attend meetings of Plaintiffs' Good News Club and various materials used as learning exercises at Plaintiffs' meetings.

22. The Plaintiffs' agent, Reverend Stephen Fournier, as well as Plaintiff Darleen Fournier, were examined at an examination before trial on January 28, 1998. A copy of the transcript of this examination before trial is annexed hereto as Exhibit "9."

23. The Defendant denies each and every on (sic) of the Plaintiffs' allegations and contends that same are without merit. More particularly, the Defendant contends that the Plaintiffs' intended use of Defendant's facilities is for the purpose of conducting religious instruction in violation of

Education Law §414 and the District's Community Use Policy.

24. Throughout the papers which they have submitted in this action, Plaintiffs have repeatedly referred to the purpose of their meetings as being consistent with the purposes they attribute to the Boy and Girl Scouts, as well as the 4-H Club and Little League [e.g.: the moral development of children].

25. However, it is respectfully submitted that it is evident from both the materials submitted by Plaintiffs in this action, as well as the examinations before trial of Stephen and Darleen Fournier, the individuals who conduct the Plaintiffs' meetings, that the purpose of these meetings is to provide religious instruction to the children in attendance.

26. To begin, the name "The Good News Club" itself has a very definite religious significance. According to Reverend Fournier, "the good news is that Christ, according to the Scriptures, died for our sins, was buried and on the third day rose again." (Exhibit "9", pp. 24-25).

27. Also worth noting is the fact that, according to Stephen Fournier, the Club is composed solely of children who are of the Christian faith (Exhibit "9", p. 27).

28. Further, as can be seen from the booklet distributed by the Plaintiffs, the "Daily Bread," the stories contained therein continually make reference to receiving the Lord Jesus Christ, accepting the Lord Jesus as your Savior from sin, believing in the Resurrection and the descent of the Lord Jesus from Heaven. (Exhibit "2", and Exhibit "E" thereto)

29. As can also be seen from the lyrics of the songs presented to children during the Plaintiffs' meetings, those songs are not only religious in nature, they involve a belief in Jesus Christ as Lord.

30. Other materials submitted by the Plaintiffs also contain numerous references to Jesus Christ as Savior. In particular, they contain sections entitled "challenge and invitation" in which children are asked to have Jesus Christ as their personal Savior and to believe that Jesus died for their sins. (Exhibit "8")

31. The following excerpts from the transcript of the examination before trial of Reverend Stephen Fournier and Darleen Fournier (Miller Affidavit, Exhibit "9"), serve to further illustrate that the purpose of Plaintiffs' meetings is to provide religious instruction to elementary school-age children:

a) Page 34 - . . . because we are teaching

morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who have somehow hurt you.

b) Page 69 - What makes them meaningful, in my opinion, is a Christian perspective, is the fact that you need a relationship with Christ to fulfill them the way God would have you fulfill them.

c) Page 86 - We would challenge the-children. We would basically say, if you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will --- we will pray with you separately, individually.

d) Page 90 - Challenge for the saved child, it would be presented as to ask God for strength to obey him completely. And then we would give an invitation that if you would like that strength to obey God and you would like to ask Jesus as your personal

Lord and Savior, come up and talk with us or Darlene and we will pray with you.

e) Page 91 - . . . And also the invitation would be if these children, if they don't know the Lord as their Savior, in order to overcome jealousy or to obey God or whatever value we're speaking of, they would need to have asked Jesus into their lives.

f) Page 94 - We would put that challenge and that invitation within the context of obeying God and his word. And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey him. And those of you who do not know the Lord Jesus as Savior, do not have him in your heart and would like to receive him as Savior so you can obey God the way he wants you to, and if you would like, we have them either raise their hand or just go and see Darlene.

g) Page 96 - The challenge, again, we would present it to the children that if you know Jesus as your Savior, God will use you, if your heart is right with him, if you desire to do what he wants you to do, and we would from there say, if you do not know the Lord Jesus as your Savior and you would like to so that you too may obey God and have your heart right with God, raise your hand and we will speak with you privately or pray with you privately.

h) Page 136 - Christian perspective is that you need the Lord Jesus to help you to be able to give you the power actually to live a moral life.

i) Pages 146-147 - The challenge is for the children to take the moral lesson that was taught and to apply it to their lives. And the invitation, it gives the children an opportunity to seek Gods strength through a personal relationship with Jesus Christ to be able to do the same thing.

32. Upon information and belief, the activities of the Plaintiffs are not merely discussions of a secular topic from a religious perspective. Rather, they are religious instruction in, and based upon, the fundamental beliefs of Christianity.

33. Upon information and belief, given the materials used by Plaintiffs to conduct their meetings, as well as the materials contained in the transcript of the examination before trial of Reverend Fournier, the Plaintiffs clearly wish to engage in religious instruction of students in receiving Jesus Christ as their Savior from sin.

34. By contrast, there has been nothing submitted to the Court, nor is there anything in the examination before trial of Defendant's Superintendent of Schools, which indicates that

Defendant's facilities have been used previously for religious services or religious instruction. (Exhibit "10")

35. Upon information and belief, there are no questions of fact to require a trial in this matter and summary judgment should be granted to the Defendant.

WHEREFORE, it is respectfully requests that this Court grant Defendant's Motion for Summary Judgment.

/s/
Frank W. Miller

Sworn to before me this
2nd day of July, 1998.

/s/
Notary Public

Wendy S. Paninski
Notary Public in the State of New York
Qualified in Oswego Co. No. 4910021
My Commission Expires Nov. 2, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The GOOD NEWS CLUB, Andrea Fournier and Darlene Fournier,	AFFIDAVIT
Plaintiffs,	97-CV-0302 TJM/DNH
vs.	
MILFORD CENTRAL SCHOOL,	Judge McAvoy
Defendant.	Mag. Hurd

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

DR. ROBERT C. MCGRUDER, being duly sworn, deposes and says:

1. I am employed by the Milford Central School District (the "District"), as its Interim Superintendent of Schools and have been continuously employed in that capacity by the District since September 1996.

2. I make this Affidavit in opposition to Plaintiffs' Motion for a Preliminary Injunction in the above-entitled action.

3. On or about September 22, 1996, I received

a standard District Use of Facilities Request Form from Plaintiff Darlene Fournier on behalf of Child Evangelism Fellowship and the Good News Club (a copy of the application is annexed to Plaintiffs' Motion for a Preliminary Injunction as Exhibit "2").

4. The stated purpose of the use of the District's school building was for singing songs, hearing Bible lessons and memorizing Scripture.

5. The District has adopted Policy No. 1500 entitled Community Use of School Facilities pursuant to New York Education Law Section 414, which limits the use of school premises to those uses specifically enumerated in the policy. In addition, the policy excludes use of the District's property for religious purposes (a copy of the policy is annexed to Plaintiffs' Motion for Preliminary Injunction as Exhibit "I").

6. I received an additional request on behalf of Plaintiffs from Rev. S.D. Fournier of the Milford Center Community Bible Church dated September 26, 1996.

7. On or about October 3, 1996, I denied Rev. Fournier's request identifying Plaintiffs' proposed use of school facilities as the equivalent of religious worship rather than the expression of religious views on secular subject matter (annexed hereto as Exhibit "A").

8. I received no further correspondence from Plaintiffs until I received a letter from counsel for Plaintiffs dated January 7, 1997. In that letter, counsel for Plaintiffs alleged that the District's denial of the use of its facilities for the teaching of Bible lessons to elementary students violated Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution, as well as their rights under the Religious Freedom Restoration Act (42 U.S.C. §2000 bb et seq.) (annexed hereto as Exhibit "B").

9. On or about January 10, 1997, a request was made for Plaintiffs to furnish the District with written materials which would be used by Plaintiffs, a description of their proposed activities, as well as an indication of who would be leading or supervising these activities (a copy of the letter dated January 10, 1997 from counsel to the District is annexed hereto as Exhibit "C").

10. On January 17, 1997, the District's counsel received a response which included a general description of the activities of the Good News Club (a copy of the letter dated January 17, 1997 is annexed hereto as Exhibit "D").

11. In addition, on or about January 23, 1997, Plaintiffs forwarded to counsel for the District various materials that the Goods News Club uses or distributes. Those materials included the following:

a) A Good News Club invitation printed on a 3x3 card
b) A parental permission slip
c) A sample puzzle
d) The "Daily Bread," a booklet which the Good News Club uses for stories.

In addition, the letter stated that children who participate in the activities of a Good News Club range from 1st graders to 6th graders (a copy of the letter dated January 23, 1997 and the various materials is annexed hereto as Exhibit "E").

12. As can be seen from the various stories taken from the "Daily Bread," the stories continually make reference to receiving the Lord Jesus Christ, accepting the Lord Jesus as Savior from sin, believing in the Resurrection and the descent of the Lord Jesus from Heaven.

13. As Interim Superintendent of Schools, it was my view that, the kinds of activities proposed to be engaged in by the Good News Club were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.

14. On or about February 13, 1997, in response to the Board's request, counsel for the District wrote to counsel for Plaintiffs asking that Plaintiffs consider postponing any litigation until a case with

similar issue and that was before the United States Court of Appeals for the Second Circuit was decided, along with the decision of the District Court (a copy of the letter dated February 13, 1997 is annexed hereto as Exhibit "F").

15. On or about February 21, 1997, the District received a counter-proposal in which the Plaintiffs asked that the Good News Club be allowed to use the facilities during the pendency of the appeal before the Second Circuit, stating that both parties could then review the Second Circuit's decision and determine if either party wished to change its position (a copy of counsel for the Plaintiffs' letter of February 21, 1997 is annexed hereto as Exhibit "G").

16. On or about February 26, 1997, the Milford Board of Education adopted a resolution denying the request by the Good News Club to use school facilities for the purpose of religious instruction and Bible classes. That decision was transmitted to Plaintiffs by letter dated February 28, 1997, (a copy of the letter dated February 28, 1997 is annexed hereto as Exhibit "H"). In addition, on or about March 3, 1997, I wrote the Rev. Fournier indicating that the Board had denied the request for the use of District facilities for what it deemed to be the purpose of religious instruction and Bible study and that the Board felt that such use was not permissible under law and District policy (a copy of

this letter is annexed hereto as Exhibit "I").

17. The Plaintiffs then commenced this litigation under 42 U.S.C. §1983 against the District alleging that the District had engaged in "religious viewpoint discrimination" in violation of the Plaintiffs' rights.

18. Contrary to the allegations made by Plaintiffs both in their complaint, as well as their Affidavits in support of their Motion for a Preliminary Injunction, the Milford Central School District has not engaged in religious viewpoint discrimination in violation of constitutional law or the Religious Freedom Restoration Act. The District is not now and never has been opposed to the discussion of secular topics from a religious viewpoint as permitted under current law.

WHEREFORE, deponent respectfully requests that Plaintiffs' Motion for a Preliminary Injunction herein be denied.

/s/
Robert C. McGruder

Sworn to before me this
27th day of March 1997.

/s/
THOMAS H. KUTZER
Notary Public, State of New York

No. 02KU5054992
Qualified in Onondaga County
Commission Expires Jan. 29, 1998

October 3, 1996

Rev. S.D. Fournier
Milford Center Community Bible Church
RD#1, Box 169
Oneonta, NY 13820

Dear Rev. Fournier:

Thank you for your recent letter and for the enclosure from the Rutherford Institute. I too spoke with legal counsel and offer you the following information regarding Milford's policy on use of the school facilities.

Milford's current policy complies with New York Education Law and with relevant court decisions. I agree that Milford cannot prohibit access to organizations simply because of their religious nature. As you may know, the Lambs Chapel decision held that a school district could not prevent a religious organization from utilizing facilities to present a religious perspective on the subject of child rearing and family values.

However, your group's request to use the school facilities indicated such use would be for the purpose of "(sic) hearing a bible lesson and memorizing scripture". I understand such proposed use to be the equivalent of religious

worship, which is prohibited under our District policy, rather than the expression of religious views or values on a secular subject matter. To my knowledge, our facilities have not been used in the past by any organization for the purpose of religious worship.

If you would like to clarify your request to utilize the facilities, I will re-consider the matter with the Board.

Very truly yours,

Robert McGruder
Interim Superintendent

c: Board of Education

THOMAS MARCELLE
ATTORNEY AT LAW
71 DEVONSHIRE DR.
SLINGERLANDS, NEW YORK 12159
PHONE: (518) 475-0806
FAX: (518) 475-0321

January 7, 1997

Robert McGruder
Milford Central School
PO Box 237
Milford, New York 13807-0237

Dear Dr. McGruder,

I represent Steve Fournier and the Good News Club. It is my understanding that the School District has denied the Good News Club the use of school facilities to conduct its meetings. It is also my understanding that the School District has permitted other groups such as the Girls Scouts to use school facilities. Further, it is my understanding that the reason for denying the Good News Club the use of school facilities is because its teaches bible lessons at their meetings.

Denying the Good News Club the use of school facilities because its activity is religious in nature

violates its right to free speech, its right to equal protection of the law, and its rights under the Restoration of Religious Freedom Act.

If within two weeks the School District fails to reverse its position and allow the Good News Club to use school facilities, I will bring suit in the United States District Court to remedy the situation.

If you or the School District's lawyer have any questions, please call me. I look forward to your response.

Sincerely,

/s/
Thomas Marcelle

TM/em

THOMAS MARCELLE
71 DEVONSHIRE DR.
SLINGERLANDS, NEW YORK 12159
PHONE: (518) 475-0806

January 17, 1997

Norman H. Gross
Ferrara, Fiorenza, Larrison, Barrett & Reitz
5010 Campuswood Drive
East Syracuse, New York 13057

Re: Good News Club use of MCSD School facilities

Dear Mr. Gross,

In response to your letter dated January 10, 1997, below is a general description of the activities of the Good News Club.

The Club's activities are run by Ms. Darlene Fournier. The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia,* learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club

closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization.

I have not yet received the literature from the Good News Club. As soon as I receive it, I will fax it to you.

I have spoken with my clients and the Rutherford Institute (who is funding this litigation) and they are eager to have this issue resolved. The Good News Club made application for use of the school's facilities in September. In October, Dr. McGruder told my client that based upon his discussion with legal counsel that the Club's application was being denied. I hope this second review of the Club's application can be accomplished swiftly. Please provide me with the School's decision by February 3, 1997.

Sincerely,

/s/
Thomas Marcelle

TM/em

xc: Mr. Stephen Fournier
Rita Wolfe, Esq., Rutherford Institute

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v. 97-CV-0302 (TJM/GLS)
Notice of Cross Motion

MILFORD CENTRAL SCHOOL

NOTICE OF MOTION

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Darleen Fournier, Paula Kiser, Randall Lamb, Raymond Lamb, Becky Edson, Steve Fournier, and Thomas Marcelle and the exhibits attached thereto, plaintiffs' statements pursuant to Rule 7.1 (f), plaintiffs' memorandum of law, all other proceedings had herein and all other papers that have been filed with the Court in relationship to the above referenced case, the undersigned, pursuant to Federal Rule of Civil Procedure 56, will move the United States District Court for the Northern District of New York (Judge Thomas J. McAvoy) at a term to be held at the United States Courthouse in Binghamton, New York on the ___ day of August, 1998, at 10:00 o'clock in the forenoon, or as soon thereafter as

counsel can be heard, for an order granting the above-named plaintiffs summary judgment and ordering Milford Central School to permit plaintiffs to use its facilities to conduct its meetings, and otherwise to cease and desist from further violating plaintiffs' the Constitutional rights well as such other and further relief that to this Court may seem just and proper, together with costs, disbursements, and attorney's fees pursuant to 42 USC § 1988.

Dated: July 29, 1998
Slingerlands, New York

Yours, etc.

Thomas Marcelle
Counsel for the Plaintiffs
71 Devonshire Drive
Slingerlands, New York 12159
Telephone: (518) 475-0806

To: Mr. Frank Miller, Esq.
Ferrara, Fiorenza, Larrison, Barrett & Reitz
Counsel for Defendant
5010 Campuswood Drive
East Syracuse, New York 13057

AFFIDAVIT OF DARLEEN FOURNIER

Darleen Fournier, being duly sworn deposes and states as follow:

1. My name is Darleen Fournier.

2. I am in charge of the organization of the Good News Club (hereinafter GNC).

3. Andrea Fournier is a member of the GNC, she is six (6) years old.

4. For the school year of 1995-1996 and from Sept. l0th - Sept. 16th, 1996 the GNC held and conducted their meetings at a location other than Milford Central School.

5. For the school year of 1995-1996 and from Sept. l0th - Sept. 16th, 1996 the children who were members of the GNC rode the bus to the GNC meetings.

6. On or about Sept. 16, 1996 GNC was informed by Milford School transportation director, Ken Cough, that the school bus would no longer transport children to GNC meetings or activities.

7. After the school bus would no longer transport members to the GNC meetings and activities I made the application (plaintiffs' exhibit 2) for use

of the school facilities by GNC.

8. Dr. McGruder never made any offer of any kind to accommodate GNC.

9. GNC is not associated with any public school or governmental agency.

10. There are no members of any public school or any other governmental agency who exercise authority (apparent or real) over the children.

/s/
Darlene Fournier

Sworn to me this 4th of April, 1997

/s/
Notary Public

MARJORIE R. CHASE
Notary Public, State of New York
Originally Qualified Otsego County
Commission Expires Dec. 31, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

v.

97-CV-030 (TJM/GLS)
Affirmation in opposition to defendant's motion for summary judgment and in support of plaintiffs cross motion of summary

MILFORD CENTRAL SCHOOL

AFFIRMATION OF THOMAS MARCELLE

THOMAS MARCELLE, being a duly licensed and practicing attorney of the State of New York and of the United States District Court for the Northern District of New York, affirms under penalty of perjury as follows:

1. I am counsel for the plaintiffs.

2. I make this affirmation in opposition to defendant's motion for summary judgment and in support of plaintiffs' cross motion for summary judgment.

3. In its brief at p. 4, defendant cites a

counter offer made by the plaintiffs in order to avoid litigation. Defendant's Exhibit 2, part G attached thereto.

4. In particular, plaintiffs offered that if defendant would let plaintiffs use its facility pending the of resolution *Bronx House of Faith* appeal, plaintiffs would leave if the Second Circuit affirmed the district court and then make a decision whether to bring a legal action.

5. Plaintiffs offered was not a tacit admission that *Bronx Household of Faith* case controlled this case. To the contrary, plaintiffs' counsel explicitly stated:

•2. The *Bronx House of Faith* case is significantly different to the Good News Club situation, and therefore not dispositive of Good News Club's right to use school facilities. First, the Good News Club is not a church conducting religious services; it is a youth organization that promotes Christian values (not any sect's doctrine or theology). Second, while the School District in the *Bronx House of Faith* case refused to permit any church services in its facilities, your client permits other youth organizations like the Boy Scouts, Girl scouts , and the

4H Club to use its facilities. While the Good News Club promotes Christian values, the School District can not discriminate against it on that ground.

•3. Case law supports our right to use the School facilities. The two cases upon which we will rely are *Good News/Good Sports*, 28 F3d. 1501 (8th Cir.) and *Church on the Rock v. City of Albuquerque,* 84 F3d 1267 (10th Cir.).

6. Defendant states pursuant to its statement of undisputed facts 6 that "During the pre-trial discovery phase of this case, plaintiffs produced the materials that Plaintiffs use in presenting lessons and holding club meetings." Exhibit 2 (part F attached thereto) and Exhibit 8.

7. Part of the materials contained in the above referenced exhibits is a booklet entitled "Daily Bread."

8. GNC neither teaches, reads, instructs, nor presents materials from the booklet entitled "Daily Bread" in Club meetings. Exhibit 12 at p.110-111.

9. The booklets are distributed to the children for their personal use as a reward for completing their quiet time calendar. Exhibit 12 at

p.110-111.

10. Your deponent was under the mistaken impression that "Daily Bread" was read to the children during club meetings. This impression was corrected by Mr. & Mrs. Fournier during preparation for their deposition in January 1998 and that correction was communicated to opposing counsel during Mr. Fournier's deposition on January 28, 1998. Exhibit 12 at p.110-111.

11. The flannel graph instructional book entitled "David"(Exhibit 7) contains the lesson plans and other materials that Mr. and Mrs. Fournier generally, but not exclusively, followed in presenting lesson to, singing songs and playing games with the children.

12. On or about July 2, 1998, your deponent called Professor Carl H. Esbeck of the University of Missouri School of Law.

13. Professor Esbeck was counsel for a Good News Club chapter in Missouri that brought suit against the Ladue, Missouri School District. *See Good News/Good Sports, 28* F3d 1501 (8th Cir., 1993).

14. Professor Esbeck provided your deponent addendum "C" (a promotional flyer for the Good News Club) to the Missouri GNC's brief

which is attached as Exhibit 8.

15. On or about July 27, 1998, your deponent called Child Evangelism Fellowship, Inc. ("CEF") and requested that it provide demographics concerning the number of Good News Clubs in the United States.

16. Mr. Joe Cox, vice president of CEF, provided by way of affidavit that there are 4,242 Good News Club across the United Sates with a total enrollment of 102,170. Mr. Cox's affidavit is attached as Exhibit 9.

17. Peter Livshin's deposition is attached as Exhibit 10.

18. Judge McAvoy's opinion dated April 14, 1997, granting plaintiffs a preliminary injunction is attached as Exhibit 11.

19. Steve & Darleen Fournier's deposition is attached as Exhibit 12.

Dated: July 27, 1998

/s/
Thomas Marcelle
Bar Roll No. 102117
Attorney for the Plaintiff
71 Devonshire Drive

Slingerlands, New York 12159
Phone: (518) 475-0806

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER,

Plaintiffs,

-against-

MILFORD CENTRAL SCHOOL,

Defendant.

- -

Deposition of Defendant, MILFORD CENTRAL SCHOOL, by its agent, Peter Livshin, held pursuant to Notice, at the Otsego County Courthouse, Grand Jury Room, Cooperstown, New York, commencing at 2:20 p.m., Wednesday, January 28, 1998, before Brenda J. O'Connor, a Shorthand Reporter and Notary Public for the State of New York. [1]

APPEARANCES:
THOMAS MARCELLE, ESQ.
71 Devonshire Drive
Slingerlands, New York 12159
Attorney for Plaintiffs

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ
5010 Campuswood Drive

East Syracuse, New York 13057
BY: FRANK W. MILLER, ESQ., of counsel
Attorneys for Defendant [2]

PETER LIVSHIN, having been first duly sworn by the Notary Public, was examined and testified as follows: EXAMINATION BY MR. MARCELLE:

Q Good afternoon.
A Afternoon.
Q Would you just state your name for the record, please?
A Peter Normal Livshin, Sr.
Q And are you employed currently?
A Yes.
Q In what capacity?
A School superintendent of the Milford Central School.
Q Okay. Now, Mr. Livshin, I'm going to ask you some questions about the school's policy for community use.
A Okay. Do you mind if I –
Q No, actually, if you have a copy, that's fine. I was going to give you a copy. I wanted to say -- just give you general parameter what I'm trying to do. That way if we get lost, you can ask me to rephrase the [4] question or put it in a different context for you, if you don't understand it.
A Okay.
Q I'm just going to try to find out basically the

breadth and the width of this policy and what it means.
A Okay.
Q If there's some question or example that I use that's not clear, just tell me and I'll rephrase it; is that all right?
A That's fine.
Q Okay.
MR. MARCELLE: Do you want that marked, Frank, or just refer to it as the school's policy
MR. MILLER: We might as well have it marked. He's got a copy there that --
MR. MARCELLE: Okay.
MR. MILLER: -- that I suppose we could use, or if you have a clean copy.
MR. MARCELLE: We can mark a clean copy, and I have a marked copy myself.
(Plaintiff's Exhibit 1 marked for [5] identification.)
Q Just let me show you what's been marked as Plaintiff's Exhibit 1 and ask you to review that.
A (Witness complies with request.) Do you mind if I use my copy?
Q Not at all.
A It will be easier for me to read.
Q I just want to make sure it's the same.
A Yes.
Q Will you identify Plaintiff's 1 for the record, please?
A It's the community use of the school facilities

of the Milford Central School, which was approved on August 26, 1992.

Q Has that policy been continuously in effect from August 26, 1992, until today?

A As far as I know.

Q Okay. Who has the authority to grant or deny an application made pursuant this policy?

A According to the policy, it's the superintendent of schools has that authority.

Q Who has the authority to interpret what the [6] policy means?

A The superintendent of schools.

Q I'd like to direct your attention under the heading where it says, use for non-religious purposes.

A Okay.

Q Could you -- in the first sentence there's a phrase, religious purposes. Could you explain what that phrase means?

A School premises shall not be used by any individual organization for religious purposes?

Q Yes.

A I would interpret that to mean conducting religious services, providing religious instruction or to an extreme, religious indoctrination into a philosophy or a belief.

Q It doesn't include any and all religious speech, I take it?

A I beg pardon?

Q It doesn't include any -- strike that. It doesn't include every aspect of religious speech, does it? [7]

A No.

MR. MILLER: Object to the form of the question. You may answer, if you're able to.

A I'm not really sure of what it is you're asking.

Q Okay. The policy doesn't preclude mentioning God at any time?

A That's correct.

Q On the premises; is that correct?

A That's correct, yes.

Q It doesn't preclude at any time from mentioning the name Jesus Christ on the --

A No, it does not.

Q Okay. Now, I wanted to just direct your attention to paragraph 3.

A Up top?

Q Up top.

A Okay. Where it states, "For holding social, civic and recreational meetings and entertainment events and other issues, other uses pertaining to the welfare in the community provided that such usage shall be [8] nonexclusive and shall be open to the general public."

Q Correct.

A Okay.

Q Would that use -- let me ask you this, does the policy permit the League of Women

Voters to sponsor candidates' debate pursuant to paragraph 3 which you just read?

A Yes, I would say that's a valid use.

Q Would the policy also permit a group to come in to conduct a debate on issues relevant to the community?

A Yes.

Q Would it include-a group to be able to come in and sponsor a debate on issues relevant to the country?

A Define what you -- I guess I --

Q Okay. That's a fair question. I mean, with respect to could a group come in and sponsor a debate whether or not there should be a constitutional amendment for a school prayer.

A Yes.

Q Okay. Is there any limitation on political [9] speech which can be conducted pursuant to the policy?

A I would be very hesitant about getting into that because I would -- there would be some issues where inciting a riot through political speech would create a problem. And if you're asking me to define what might do that, I'm not sure I could, but I would --

Q Well, absent incite a riot or subversive speech or illegal speech such as obscenity or pornography, absent those narrow exceptions, are there any other exceptions?

A In my capacity as the superintendent?

MR. MILLER: Excuse me, Mr. Marcelle, you're asking the question in reference to political speech?

MR. MARCELLE: Political speech.

MR. MILLER: And I take it by political speech you're not referring to a meeting of an organized political party?

MR. MARCELLE: No.

MR. MILLER: Because that's prohibited in the 414 and I just – [10]

MR. MARCELLE: I'm sorry.

MR. MILLER: No, I had a question about that. Do you understand now what he's asking you?

THE WITNESS: Not specifically. State it again because --

Q Let me say it this way: If someone or a group wanted to use the school to discuss any political idea that wasn't illegal or it wasn't about to incite a riot, is that permissible under the policy?

A Probably is. Now, the issue is would I agree to allow that in my capacity as superintendent, I don't know.

Q What would be some of the factors that would -- that would make you decide that you wouldn't allow it?

A The particular group or individuals who were asking to use the school facility might be a major factor. I think that would be the key

factor. If there were individuals who might -- who have demonstrated past practice [11] of being irresponsible and being able to handle a meeting or handle a situation.

Q The school policy allows entertainment events --

A Yes.

Q -- for community groups, correct?

A Yes.

Q Okay. I take it that would include concerts?

A Yes and no.

Q Okay. I suppose there would be certain limitation in types of concerts you would allow; is that correct?

A Yes.

Q Okay. Would you allow a Christmas concert that was comprised mainly of Christian choir music or traditional Christian songs?

A Are you talking about an outside group using --

Q An outside group.

A Probably.

Q I take it also the policy allows for outside groups to show -- put on plays and films of that nature, things of that nature? [12]

A The outside groups that have used the facilities since I've been there, I haven't seen films, but there -- obviously there were productions that were put on.

Q And that use is permitted under the policy?

A Yes.

Q And I take it, too, there would be certain exceptions under --

A Yes.

Q -- under that as well?

A Yes.

Q Would a film such as The Ten Commandments be allowed to be shown? And I say Ten Commandments, I don't know if you're familiar with the film. It's Charlton Heston.

A Yes, right, yes.

Q Are you familiar with the film called, The Jesus Film?

A No.

Q Okay. I'm going to describe the film to you, generally what the contents are, and ask you if that's something that would be allowed pursuant to the school policy. [13]

A Could I ask you a question?

Q Sure.

A Now, we're -- everything that you're stating is outside use, somebody coming in and showing --

Q Yes, I'm talking not about the school teachers or part of a class project, but a community group that has no affiliation with the school or its officers.

A Okay.

Q This is a film that a community group would like to show that recounts the life of Jesus according to the Gospel of Luke, and at the

end of the film declares Jesus is the Son of God and has the power to save a soul from hell. Additionally, the narrator of the film at its conclusion invites the audience to join him in a prayer for salvation.

A And I know this before the --

Q Imagine for a hypothetical here that's part of that purposes form of your --

A It's listed right there?

Q It's listed right there. [14]

A To be truthful, I would have to consult counsel, get an opinion on that --

Q Okay.

A -- before I would say yes or no.

Q Still under paragraph 3, just direct your attention now to social groups, groups like the Boy Scouts, the 4-H and the Girl Scouts. Are the Boy Scouts allowed to use the school --

A Yes.

Q -- facilities under this policy?

A Yes.

Q Okay. Is it consistent with the school policy to allow the Boy Scouts to recite their Scout oath on school policy?

A You mean on school grounds?

Q On school grounds, I'm sorry.

A Yes, they have their meetings, they have to.

Q Okay. And if one of the purposes of the Boy Scouts is to influence a boy's character, development and spiritual growth, would the

Boy Scouts still be allowed to use the school facilities? [15]

A Yes.

Q Okay. Would a group that wanted to teach children to read Aesop's Fables -- would a group that wanted to use, let's say, for example, teach children from Bill Bennett's Book of Virtues be allowed to --

A Got to help me out.

Q You don't know --

A No.

Q Strike that question. Would a group that wanted to use Aesop's Fables to teach children moral values by using those fables be permitted to use the school under the policy?

A I'd have to see what context they were going to be used in, what -- you know, what the purpose -- obviously the purpose of the group has to be more than the use of Aesop's Fables or --

Q Suppose someone comes in and reads, you know, the sour grapes story and teaches the children that it's not right to be bitter if you don't get something, things of that nature, just general moral values that are out there in [16] different literatures --

A Yes. Yes, I'm sorry. Yes.

Q Before I get to the last thing, I just saw a note that I wanted to get to and I almost forgot, and if I don't remember now, I'll

forget. Room 119, where is that located in the school?

A It's on the -- my direction's not all that good in terms of north, south, east, west. It's on the first floor midway down the hall on the left-hand side on the -- I believe it would be the west side of the school.

Q What is that room normally used for?

A It's -- that particular room is divided in half. There's a moveable partition in there now. On each side of it are two special education resource rooms, one is for -- one half of it is for a high school resource room, the other half is taught by another special education teacher for kids that are slightly younger than high school age, 12 and 13 years.

Q Is room 119 located in either of the elementary school rooms? [17]

A Yes, it's right next to the combined -- we have a multi-age third and fourth grade. If my memory serves me correct, the multi-age third grade is right next door and the fourth grade is one door down.

Q Is room 119 itself used for any elementary classes?

A No.

MR. MARCELLE: Sorry for that diversion, but I would have forgotten if --

MR. MILLER: No problem.

Q Let's go back to paragraph 1 of the policy.

A Okay.

Q And that reads, for the purpose of instruction, any branch of education of learning or the arts; is that correct?

A Okay.

Q I take it an outside group could petition the school for use to teach academic subjects pursuant to that provision?

A Make sure I qualify, barring any issues of subcontracting within the teachers' contract, yes. [18]

Q Okay. If an outside group, given your caveat, wanted to come in and teach a course that the earth was created by the big bang or other cosmic accident, would that be permitted?

A Sure.

Q And if a group wanted to come in and teach that man was the product of evolution, would that be permitted?

A If I would allow the so-called big bang concept versus, you know, an evolution, yes.

Q Would you allow a group to come in and teach that man was created by God as described in the Book of Genesis?

A If I allowed the other two, I would be hard pressed not to allow the third, under those conditions.

Q Could someone also come in pursuant to, I guess, either paragraph 1 or 3 and conduct a seminar on the causes of crime, and their thesis being the cause of crime is poverty?

A Yes.
Q And could someone come in and teach a course on teenage pregnancy and the thesis being that [19] the pregnancy -- the crisis of teenage pregnancy is because of the lack of good sex education in the public schools?
A Could I qualify that answer?
Q Sure.
A That doesn't sound like they're teaching anything. That sounds like they're more editorializing. And I would have a problem -- I would have a problem with that, considering the nature of the health programs and programs within the school.
Q Could a group conduct a seminar on teen pregnancies and list a whole host of factors that may contribute without signaling out one for special treatment?
A I would probably approve it, but not without a great deal of controversy from segments of the community.
Q Okay. Could a group come in and -- pursuant to the policy and hold a seminar or course attributing the cause of crime in our society to their lack of faith in God?
A I would think that I would have to allow that [20] as long as it was stated -- you know, stated along those particular lines. I think that probably if I were to allow one, I would allow the opportunity for the opposite side, whichever group wanted to come in and

speak. If I would allow, for example, the group who made that statement that you referred to in terms of poverty being the result of lack of faith in God, I would allow the other group the same time to give a presentation. I would try to encourage more of a public presentation of both points of view at the same time.
Q All right. And I take it from your answer that that would be an appropriate use for the school?
A My interpretation. There may be others that might have a different interpretation of that.
Q But I also understand you're the one who has the power to --
A As my being the superintendent, yes. Another superintendent might have a difference of opinion.
Q Okay. Have you ever seen the Good News Club [21] in action?
A No.
Q Outside of sitting here today and listening to the depositions of the Fourniers, what is your knowledge of what the Good News Club does?
A Well, I've heard what this is --
Q I know.
A I don't know what to tell you other than --
Q Let me ask you this, let me ask you it another way. Outside of -- prior to today, outside of the application submitted to the

school and the papers that are part of this litigation, is there any other source of knowledge you have of what the Good News Club does?

A No.

Q I take it you're -- let me ask you. Under your interpretation of this policy, Exhibit 1, does the Good News Club qualify for use of the school facilities?

A Not the way the building use form is written. I would have to say no based on Education Law 414 and the district's policy.

Q And it's – [22]

A Again, that's my interpretation of it.

Q And it's objectionable because --

A May I get a copy, of the building use form that Darleen --

MR. MILLER: Are you asking him these questions based on the building use form or are you asking him about --

MR. MARCELLE: No, based on the building use form.

MR. MILLER: All right.

MR. MARCELLE: Or anything else he knows from the course of the litigation prior until today.

MR. MILLER: Well, I think --

A This is the one from September of '96, not the one that's filled out this year.

Q I think it's almost identical, but we can use that.

A It's a group of boys and girls meeting one hour a week for fun, singing songs, is that hearing -- hearing Bible lessons and memorizing Scripture. And it sounds -- my interpretation [23] would be that the last two, hearing Bible lessons and memorizing Scriptures would tend to make it in my mind more, for lack of a better phrase, talking, Catholic school, more of a church school type of scenario.

MR. MARCELLE: Trying to find my exhibit list.

MR. MILLER: The exhibits for today, you're looking for, Tom?

MR. MARCELLE: Yes, I had a list I made up.

MR. MILLER: I have them all here.

MR. MARCELLE: Do we have Exhibit D?

MR. MILLER: Yes.

Q I'm going to show you Exhibit D, what's been marked Exhibit D for identification, just ask you to review it.

A (Witness complies with request.) Okay.

Q Under the description -- strike that. Pursuant to the description of the Good News Club as outlined in Exhibit D, would the Good News Club qualify for use of the school [24] facilities?

A Again, the problem that I have that I would need clarification on, children hear Bible story and learn Scripture, I don't know in what sense -- in what sense that would

mean. Is the Scripture being presented -- how do I want to say this? In a historical approach, in a -- using a particular, either part of the Old Testament or New Testament to deal with moral issues, or is it -- or is it used to – and again, I have to be biased here because I've sat here all morning, to promote the gospel. And if that's indeed the case, then I have a problem with it in terms of using the school for that purpose. Whatever my personal beliefs are, but I would say as the superintendent --

Q And the problem is that it violates that non-religious use clause; is that correct?

A It does in any interpretation of the community use of facility, board policy, and my limited knowledge of Education Law 414.

MR. MARCELLE: Can I just talk with [25] Steve for a second? I think that I'm probably about finished.

(A short recess was taken)

MR. MARCELLE: Just one last thing to clarify a point, under paragraph 1 of the policy.

Q Outside of religious education, religious instruction, is there any limitation with respect to the instruction that can be conducted pursuant to paragraph 1?

A I would have some serious problems. The purpose of instruction was to incite riot, I would have some serious concerns. If the

purpose of the instruction - - want to be careful in saying this. If the purpose of instruction is to create an environment that's unwholesome, unhealthy, immoral in nature, and it's a very, very loose interpretation of that, but - -

Q Okay. Outside of those caveats, the incite to riot, and we'll just say, I'll just use the phrase immoral for right now, is there any other limitation that you can think of? [26]

A Or any type of activity, for example, that might cause physical harm to the building or an employee, example, group might want to come in and use the facility for speed ball and they would do it outside the gym area or, you know, something where the facility would actually get physically harmed, use of the chemistry lab, something like that.

Q With respect to putting on a theatrical production, a play, a concert or a film, is there any limitation with respect to that?

A Yes.

Q Okay. And what --

A Again, films that -- God, I hate using this phrase because it's not -- immoral in nature, pornographic in nature, and not using the Supreme Court's definition of it, a much more loose interpretation of that, a film that is extremely violent in nature. And the best example I could give you, I would take a lot of heat, but I would never allow the film The

Clockwork Orange to be shown in the Milford School even in a film course, if it were [27] offered.
MR . MARCELLE: No more questions.
MR. MILLER: Okay, great.
(Whereupon the proceedings were concluded at 2:49 p.m.)

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PLAINTIFF'S EXHIBITS

Exhibit	Description	Page
1	Community use of school facilities policy.	6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLEEN FOURNIER,

Plaintiffs,

-verses- 97-cv-302

(MOTION DECISION)

MILFORD CENTRAL SCHOOL,

Defendant.

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, NY 12207, on MONDAY, APRIL 14, 1997, before the HON. THOMAS J. McAVOY, United States District Court Judge. [1]

APPEARANCES :

FOR THE PLAINTIFFS :

THOMAS MARCELLE, ESQ.

FOR THE DEFENDANT :

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ

BY: NORMAN H. GROSS, ESQ. [2]

THE CLERK: The Good News Club versus Milford Central School, 97-CV-302. May I have the appearance for the plaintiff, please.

MR. MARCELLE: Thomas Marcelle for plaintiffs.

THE CLERK: On behalf of the defendants.

MR. GROSS: Norman Gross for defendants.

THE COURT: All right. This is a motion by the plaintiff for preliminary injunction to permit plaintiffs to use defendant's facility to conduct its meetings.

Mr. Marcelle, you have to tell me why you are entitled to summary judgment.

(Following oral argument, the Court rendered the following oral decision:)

THE COURT: All right. Thank you. Very interesting. I see neither counsel cited a case of Toby Tyler versus Tioga Central School District. Did you see that case?

MR. GROSS: That's the Travis case, your Honor?

THE COURT: Are you familiar with it?

MR. GROSS: I am, yes.

THE COURT: I am glad somebody is. The plaintiffs, The Good News Club, Andrea Fournier and Darleen Fournier, come before the Court today

seeking a preliminary injunction to permit The Good News Club to [3] hold meetings at Milford Central School, the defendant herein. More specifically, the plaintiffs have alleged that by denying them the right to meet at the school, the defendant has violated the plaintiffs' First Amendment right to free speech, the Religious Freedom of Restoration Act, 42 U.S. Code Sections 2000bb et seq. and the Equal Protection Clause.

In general, to obtain a preliminary injunction, plaintiffs must show that they are likely to suffer possible irreparable injury if the injunction is not granted and either a likelihood of success on the merits of their case or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in their favor. Reuters Limited versus United Press International, 903 Fed 2d 904, at 907. Where the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the District Court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim. Plaza Health Labs, Inc. v. Perales, 878 Fed 2d 577, 580.

There's a sharp dispute between the parties as to which prong of the preliminary injunction test applies, assuming the Court first determines that

irreparable harm will result in the absence of an injunction. On the authority of Deeper Life [4] Christian Fellowship, Incorporated versus The Board of Education of City of New York, 852 Fed 2d 676, 680-681, the Court finds that the second less rigorous fair ground for litigation test should be applied in the context of this case.

In Deeper Life, a similar factual scenario was at issue. A New York school, acting pursuant to New York Education Law Section 414 governing the use of school facilities, denied after-hours use of the school building to a religious organization planning to conduct religious activities at the facility. Although there are factual issues in this case that distinguish it from Deeper Life, such as the nature of the plaintiff group and the activities that would be conducted on school grounds, these factual differences do not mandate that the Court apply the likelihood of success test to the injunction inquiry. This is because the factual differences do not show that the plaintiffs seek to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme. Thus, if the Court finds that the possibility of irreparable harm exists, it will then turn to whether this case presents fair ground for litigation.

As to the issue of irreparable harm, it's well established that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable harm.

Paulsen versus County of Nassau, 925 Fed 2d 65 at 68. The defendant argues that because The Good News Club, the GNC, [5] has not yet used the defendant's facilities, or even met as a group, there's no harm at all. The plaintiffs counter that the GNC has met previously and that the defendant used to provide transportation for GNC members but no longer will. This leads to the question -- I am sorry. This led to the request by the GNC to use the Milford School cafeteria. That request was denied. The very denial means that the GNC cannot meet. According to plaintiffs, it is this alleged inability to meet for reasons based on religious viewpoint of the GNC that has impinged their First Amendment right to free speech. The Court notes that since the violation of a constitutional right is the irreparable injury asserted by the plaintiff in this action, the two prongs of the threshold showing required for injunctive relief merge into one. In order to show irreparable harm, plaintiff must show a fair ground for litigation. See Bery versus City of New York, 906 Fed Supp 163, 166. Therefore, the Court now turns to an inquiry of that issue.

The plaintiffs allege The Good News Club, GNC, is a youth organization that promotes and teaches Christian values. The GNC is open to any child between the ages of 5 and 12. Moreover, the GNC is not affiliated with any church and does not teach any particular religious sect's doctrine or theology. I am not sure after our argument this

morning that that's still the case.

The GNC requested the use of the Milford School [6] cafeteria between the hours of 3:00 and 4:00 PM for meetings. This request was denied by phone by Dr. Robert McGruder, Superintendent of Milford Central School, on the basis that religious groups are prohibited from using the school building. A subsequent letter, dated October 3, 1996, was sent to GNC by Dr. McGruder formally denying GNC the use of the Milford School cafeteria. The letter stated that the GNC's activities were considered the equivalent of religious worship, which is prohibited under Milford School policy.

The primary basis for the plaintiffs' suit is the claim that they are entitled to use Milford School facilities but have been denied such use solely because they conduct activities and convey a message from a religious viewpoint. Other groups use the facility, such as Boy, Cub and Girl Scouts and 4-H. The plaintiffs contend that they, like the other groups, are a youth group teaching young people values. The only ostensible difference between the GNC and other groups, a difference that is not conceded by the GNC, is that the GNC teaches those values from a Christian religious viewpoint.

The defendant argues that the Court should not grant injunctive relief for the reason that the plaintiffs cannot show a likelihood of success on the merits. Defendant does not directly address

the issue of whether plaintiffs' case presents fair ground for litigation. Nevertheless, the Court notes that the defendant argued that the GNC meetings are [7] actually religious lessons, and that such conduct makes the GNC remarkably different from scout troops and other organizations that have been granted use of defendant's facilities.

In addition, the defendant opposes granting the injunction because, in its view, the setting will expose unsophisticated and impressionable young children, as opposed to adults or even older children, to the GNC message. It is the defendant's contention that such young children may be unable to distinguish between the subject matter endorsed by the school during school hours and that endorsed by a religious group meeting after hours at the school. Finally, the defendants suggest that by permitting the GNC to use its cafeteria will run afoul of the Establishment Cause.

For the reasons I will state momentarily, the Court finds that this case raises fair grounds for litigation and the balance of the hardships tips decidedly in plaintiffs' favor. Thus, plaintiffs are entitled to injunctive relief.

There's no question that the defendant can limit the use of its facilities and that it need not permit even those uses provided for in Section 414 of New York's Education Law. See Lamb's Chapel versus Center Moriches School District, 508 US 364, 392-393. However, once it has established itself as a limited forum by permitting certain

categories of outside uses of its facilities, the State, in the person of the defendant, must respect the lawful boundaries it has itself set. See [8] Rosenberger v. Rector and Visitors of University of Virginia, 115 S.Ct. 2510 at 2517.

In the instant case, it's undisputed that the defendant has opened its facilities for certain uses, namely, the purpose of instruction in any branch of education, learning of the arts, for holding social, civic and recreational meetings and entertainment events and other uses, provided such uses will be nonexclusive and shall be open to the general public. That's from the Policy of the Milford Central School District at page 1. In particular, scout groups and other youth groups have been given permission to use the defendant's facilities.

Clearly, as demonstrated by the exhibits submitted with each side's papers, a primary purpose and/or the content of these groups is to teach young people proper habits and values. The Supreme Court instructs, quote, "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral." Lamb's Chapel at 392, 393. However, if the request for use by the GNC would not have been denied for any reason other than the fact that the meetings

would have been from a religious perspective, the denial is impermissible because it is not viewpoint neutral. Lamb's Chapel at 393-394. [9] More recently, the Supreme Court elaborated when it stated, quote, "When the Government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The Government must abstain from regulating speech when the specific motivating ideology or the opinion of the speaker is the rationale for the restriction." Rosenberger at 2516. Thus, there is a distinction between content-based discrimination, which is permissible if it preserves the purposes of a limited forum, and viewpoint discrimination, which is impermissible when directed against speech that otherwise is within the purposes of the forum. Rosenberger at 2517.

In the instant case, the central dispute relates to each side's understanding of the content of the plaintiffs' GNC meetings. Is the content religious, as alleged by the defendant? Or is it non-religious but presented from a religious viewpoint, as alleged by the plaintiffs? Both sides have strenuously argued in their brief that Lamb's Chapel and Rosenberger are or are not controlling thick. The Court need not decide this issue today. Rather, the Court holds that Lamb's Chapel and Rosenberger pinpoint the critical issue in this case;

that is, the content of GNC's meetings. That is an issue discussed at length in Lamb's Chapel and Rosenberger and in a number of Second Circuit decisions. See, for example, [10] Deeper Life, which I have cited previously today. Clearly, this issue presents fair ground for litigation as it can only be resolved after full and complete proof of the nature of the GNC's programming. See Jack Kahn Music Company, Inc. versus Baldwin Piano & Organ Company, 604 Fed 2d 755, 763.

The Court also finds that the balance of hardships turn in plaintiffs' favor. First, the plaintiffs, although they have not yet used the defendant's facilities, will, in the absence of injunctive relief, be left without a viable meeting place. It has been alleged that the defendant has discontinued the practice of busing GNC members to the former location. Thus, without transportation, it may be impractical for the group to meet. In addition, the fear that the defendant has expressed of confusion of the young non-member students at Milford is sufficiently minimized by the fact that the meetings are not being held during school hours and in a location other than the classrooms. Thus, there is less chance that the students will witness the meetings or mistakenly perceive the meetings as a part of their state sponsored curriculum. See, Lamb's Chapel and Deeper Life previously cited.

Finally, the defendant's concerns as to violating the Establishment Clause have been

addressed previously in, among other cases, Deeper Life. In Deeper Life, the concerns that were raised about the Establishment Clause were [11] sufficiently minimized by the fact that the plaintiffs' program was after school hours and related to topics permitted by the school generally when presented by other groups. See Deeper Life, 681. Notably, in Deeper Life, although somewhat factually dissimilar from the instant case, the Second Circuit found that there was fair ground for litigation and the balance of the hardships tipped decidedly in favor of the plaintiff such that injunctive relief was properly imposed.

For the reasons stated here today, the Court grants the plaintiffs' motion for a preliminary injunction permitting the Good News Club to use the Milford Central School cafeteria pending final resolution of this case to commence after the plaintiffs file a $25,000 bond with the Court pursuant to Rule 65(c).

So if the plaintiff will submit an order.

MR. MARCELLE: Yes, Judge.

THE COURT: Suppose I ought to put on the record and state that the Court is of the Roman Catholic faith and was also a school board member for five years. That's kind of a balancing. I don't think it requires disqualification or recusal, though.

(Court adjourned at 11:41 AM.) [12]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER,

Plaintiffs,

-against-

MILFORD CENTRAL SCHOOL,

Defendant.

- -

Deposition of Plaintiffs, THE GOOD NEWS CLUB, by its agent, Stephen Fournier, and DARLEEN FOURNIER held pursuant to Notice, at the Otsego County Courthouse, Grand Jury Room, Cooperstown, New York, commencing at 9:30 a.m., Wednesday, January 28, 1998, before Brenda J. O'Connor, a Shorthand Reporter and Notary Public for the State of New York. [1]

APPEARANCES:

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REITZ
5010 Campuswood Drive
East Syracuse, New York 13057
BY: FRANK W. MILLER, ESQ., of counsel
Attorneys for Defendant [2]

STEPHEN FOURNIER, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY MR. MILLER:

Q Good morning, sir. My name is Frank Miller. I'm going to ask you some questions, and if at any time you don't understand my questions, just let me know and I'll rephrase the question. Can we agree upon that?
A Yes.
Q All right. Would you state your full name for the record, please?
A Stephen Douglas Fournier.
Q And how old are you?
A 36.
Q And your date of birth, please?
A February 4th, 1961.
Q And where were you born and raised?
A I was born in Westerly, Rhode Island, and raised in Montville, Connecticut.
Q How long have you lived in the Milford area?
A About four and a half years.
Q Okay. What is your current address? [4]

A 2582 State Highway 28, Oneonta, New York 13820.
Q What is your educational background?
A I've graduated from high school and I have a diploma in Bible, and I'm currently working on my degree in Biblical studies.
Q Okay. Where did you attend high school?
A Montville High School.
Q In Connecticut?
A Yes, sir.
Q And what year did you graduate?
A 1979.
Q And where did you attend Bible school?
A Bethany Bible College. I did not attend physically, I took correspondence courses.
Q Okay. And in what years did you take courses through that institution?
A Let me think. I probably began, and I couldn't say for certain what my first year there -- it was probably in '88.
Q Did you receive a diploma or certificate at the end of your courses of study?
A Yes. [5]
Q Okay. What is the nature of the diploma or certificate that you received?
A it's a diploma in Biblical studies.
Q Okay. And what year did you receive that?
A It would have been sometime in 1990, and I'm just -- I'm not -- I can't say that for hundred percent sure.
Q I'm sorry?

A It would be around that time. I'm not exactly sure.
Q All right. And that certificate was issued by Bethany College?
A Bethany Bible College and Seminary, yes.
Q And where is Bethany Bible College?
A It's in Dothan, Alabama, Dothan.
Q Could you spell that for the record?
A D-O-T-H-A-N.
Q And you indicated you're currently working in Biblical studies?
A Yes.
Q And through a particular institution?
A Bethany.
Q Okay. And is that also by correspondence? [6]
A Yes.
Q And are you working toward a particular degree or diploma?
A Yes.
Q And what degree or diploma would that be?
A BA degree in Biblical studies.
Q And would that be a bachelor's or master's?
A It would be my associate's.
Q Okay. What is your current occupation?
A I'm a village missionary. And which would -- is a pastor of a church, is basically --
Q And what church are you the pastor of?
A Milford Center Community Bible Church.
Q How long have you served in that position as pastor?

A In that church?
Q Yes, sir.
A About four and a half years.
Q Okay. Previous to that what did you do for a living?
A I was a pastor.
Q Okay. And where were you a pastor?
A In Montville, Connecticut. [7]
Q Okay. And is there a particular church there that you were assigned with or assigned to?
A Yes.
Q And what was that church?
A Montville Union Baptist Church.
Q And how long were you the pastor there?
A Full-time, about a year.
Q Okay. Previous to that, what was your -- the nature of your employments or occupation?
A I was a maintenance mechanic.
Q Okay. And where were you a maintenance mechanic?
A In Montville, Connecticut.
Q And how long were you employed as a maintenance mechanic in Montville, Connecticut?
A Approximately five years.
Q What was your reason for parting from the Montville Union Baptist Church after one year as pastor?
A As I stated earlier, I'm a village missionary, and the goal of Village Missions is to supply full-time pastoral leadership to small [8]

churches in rural areas, and I was sent out on the mission field, basically, Montville was my home church.
Q I see. Okay. Village Missions, is that -- is that an organization to which you belong, or are employed by?
A Yes.
Q Okay. Can you describe what that organization is? I'm not familiar with it.
A They are a non-denominational missions organization that supply full-time pastoral leadership to churches in rural areas in North America.
Q Okay. Prior to the time that you were employed as a maintenance mechanic were you involved in any other line of work or occupation?
A I was a maintenance mechanic at another factory.
Q I see. And how long did you serve as a maintenance mechanic in the prior factory, the one prior to Montville, Connecticut?
A I would say it was about four years, but I'm [9] not -- I'm not certain.
Q Were you ever in the military?
A Yes, sir.
Q Okay. When were you in the military?
A I entered in the military September of '79.
Q What branch were you in?
A Air Force.
Q And how long did you remain in the

military?
A About three and a half years.
Q Okay. And what type of discharge did you receive?
A Honorable.
Q Would I be correct in my assumption that after your time in the Air Force, you became employed as a maintenance mechanic in Connecticut?
A No.
Q Okay. Was there something between that time when you left the Air Force and went to work as a maintenance mechanic?
A Yes.
Q Okay. What was that that you did?
A When I first was honorably discharged from the [10] Air Force, I worked as an electrician.
Q How long did you work as an electrician?
A That was about six months.
Q And then what did you do after that?
A Then I went to work for Electric Boat.
Q And where was that?
A In Groton, Connecticut.
Q And how long were you employed there?
A Approximately six months.
Q And then what did you do after that?
A Then I was employed by New England Dairies in Hartford.
Q What did you do for New England Dairies?
A I began on the shipping platform, and then I was put in maintenance.

Q And how long were you employed by New England Dairies?
A Four years, approximately.
Q And then after that what did you do?
A That was when I was -- went to the place in Montville, ran Whitney Robertson.
Q What was the name of that?
A Whitney Robertson. [11]
Q What was your reason for leaving Electric Boat in Groton, Connecticut?
A More money.
Q Okay. What kind of training did you receive in the Air Force?
A I was an electronics navigational systems specialist.
Q Okay. Now, at the -- you are married at the current time, as I understand it?
A Yes, sir.
Q Okay. And your wife's name is Andrea?
A No, sir.
Q Oh, I'm sorry, your wife's name is Darleen, pardon me.
A Yes.
Q And what's your date of marriage?
A June 13th, June 13th.
Q Do you recall the year?
A 1980. Right? No, strike that, '81.
Q Okay. And I understand you have several children?
A What do you mean by several?
Q Well, you have a few kids, I guess? [12]

A I have three.
Q Their names and ages, please?
A Brooke, she is 11, Andrea, age seven, and Bethany, age four.
Q Now, does your oldest -- do two of your children currently attend the Milford Central School District?
A Yes, sir.
Q And how long has Andrea attended the Milford Central School District?
A She is in her third year.
Q Now, are you familiar with an organization known as the Good News Club?
A Yes, sir.
Q Okay. What is your current relationship with the Good News Club?
A I am the teacher.
Q Now, can you describe the organization for me known as the Good News Club, what is it and what does it do?
A We are a club for elementary-aged children who seek to instruct children in morals from a Christian perspective. [13]
Q How long has the Good News Club been in existence, that you're involved with here?
A I'm sorry. I didn't hear the last part of the question.
Q How long has the Good News Club, how long has that been in existence that you're involved with here in the area?
MR. MARCELLE: I'm going to object. Do

you mean the local chapter here as opposed to the national organization?
MR. MILLER: The local chapter, that's correct.
A I believe this is our second year.
Q Was there a period of time when the Good News Club held its meetings in a local church?
A Yes.
Q Okay. Were you involved with the local Good News Club at that time?
A No.
Q Okay. Are you familiar with the meetings of the Good News Club that occurred in a local church?
A I'm not sure I understand what you mean by [14] that question.
Q You're aware, I take it, that prior to the time that the Good News Club began to meet in the Milford Central School building, that the club apparently met in a local church, am I correct in that?
A Yes, you are.
Q Okay. Do you have any familiarity with the activities of the club while it was meeting at the local church?
A Yes, I do.
Q What local church did the Good News Club meet at?
A Milford Center Community Bible Church.
Q This is the church at which you're the

pastor?
A That would be correct.
Q And how many years did the Good News Club meet at the Milford Center Community Bible Church?
A I think it was just a year, but it could have been two. The years kind if just blend together. It may very well have been two. That would be --
Q All right. During the time that the Good News [15] Club met at the Milford Center Community Bible Church, how were the children brought from the school to the church for their meetings? Are you familiar with that?
A Yes, sir.
Q Okay.
A They were transported by two different means during two different periods of time.
Q Can you tell me about those?
A First they were transported by bus, and then transported privately by parents or a parent.
Q When they were transported by bus, what organization provided the bus to students?
A Milford Central School.
Q And when they were transported by parents, do you know who the parents were who were transporting the children?
A Yes.
Q Okay. Who were they?
A A woman by the name of June Lamb.

Q Any others involved in the transporting of students?
A I could not give you any other names. [16]
Q Okay. During the period of time that the Good News Club met at the Milford Center Community Bible Church, approximately how many students from the Milford School District participated in the club?
A I could not give you an answer to that.
Q Okay. Do you have any records that would -- that would answer that question for us?
A No, I do not.
Q Do you know if there are any records in the possession of the club or the church that would have that answer for us?
A There are no records in possession of the club or the church that would have that record.
Q Do you have an estimate of the approximate number that were involved in the club when it met at the church?
A I would estimate maybe eight to 10, that's a guess.
Q And how many students are involved in the club at the present time?
A Over 20.
Q Now, is the Good News Club at the local level [17] affiliated with a larger or parent organization?
A Yes.
Q Okay. Can you tell me what organization

that is?

A CEF, Children Evangelism Fellowship.

Q And what is the Children's Evangelism Fellowship?

A It's a organization that runs Good News Clubs.

Q Okay. Do they do anything besides run Good News Clubs?

A I am really not familiar with all that they do.

Q Okay. Is the Children Evangelism Fellowship organization connected with any religious group or denomination?

A Not that I'm aware of.

Q How is it that -- or what is it, rather, to the extent that you know, that the Children Evangelism Fellowship does in relationship to the local Good News Clubs?

A If you could rephrase that?

Q Sure. Describe for me what involvement, if any, the Children Evangelism Fellowship has with the running of the local Good News Club.

A They provide us with the material for the Good News Club.

Q Anything else?

A Support.

Q Anything else?

A Training is available through them.

Q Anything else?

A Nothing that comes to mind, sir.

Q Okay. What kind of materials do they supply

for the club?

A They supply all the teaching materials.

Q Okay. Do they provide anything else?

A There's other materials available that we can use if we choose to.

Q Are the use of materials supplied to you in your capacity as the teacher at the Good News Club for a fee or a charge of some kind?

A Yes.

Q Okay. And is the Christian -- or the Children Evangelism Fellowship organization a [19] for-profit or not-for-profit organization?

A I do not know.

Q Okay. The fees that are charged for materials, do you know what type of a fee structure they have for that?

A I don't understand the question.

Q All right. Do you know what you're paying for the materials that you supply or that are supplied to you from the Christian Evangelism Fellowship organization?

A Yes, I do.

Q Okay. How much are you paying for materials and so forth?

A It depends what materials you're referring to, sir.

Q All right. Well, you mentioned some teaching materials.

A It would be approximately $30 for one quarter of teaching materials.

Q Okay. And is that just the teaching manual for the $30 that you're paying for?
A No.
Q Okay. What do you receive for the $30? [20]
A We receive the manual use, I would say, some song sheets, things that we can copy to distribute to the children, that sort of thing.
Q All right. Other than purchasing those kinds of teaching materials, have you purchased anything else from the Children's Evangelism Fellowship organization?
A Yes.
Q What are the other kinds of things you've purchased from them?
A We've purchased Daily Bread, little booklets, they're called Daily Breads. That's all that I can recall at this point.
Q Now, you also mentioned that the Children Evangelism Fellowship provides support. What type of support do they provide?
A Prayer support. If there's a situation that arises that you may not know how to handle or, you know, they would be there to support us in that manner as well, emotional support.
Q When you mentioned prayer support, what did you mean by that? [21]
A They pray for us, they -- my wife and I is running the club. They would just pray for the club in general.
Q All right. Now, when you say they, who

specifically within the Children Evangelism Fellowship organization are you aware prays for you and your wife in a club?
A Ted and Anna Webb.
Q And who are they?
A Ted is the -- I believe he's referred to as the tri-county director of CEF.
Q Where's he located?
A Afton, New York.
Q Does the Good News Club ever pray for Ted and Anna Webb?
A No.
Q Does the Good News Club as part of its routine or part of its regular activity pray for anyone?
A Yes.
Q Okay. What are the nature of the prayers that are said by the Good News Club as part of its regular activity? [22]
A We have an opening prayer that is just a general prayer.
Q Anything else?
A Just a general prayer.
Q Okay. Any other kinds of prayers said during the club meetings?
A There may have been a prayer at some point for missionaries that are supported by CEF or --excuse me, I should say that are CEF missionaries.
Q Any other types of prayers said by the club?
A There may be at times prayers said to receive

Jesus as their personal Savior.

Q Any other kinds of prayers that are said?

A Not that come to mind, no.

Q Okay. Is the Good News Club, at the local level in which you're involved, is that an incorporated organization?

A I have no idea.

Q Okay. The Children Evangelism Fellowship organization, is that an organization that is affiliated with Christian groups?

A Could you please repeat the question? [23]

Q Sure. I'm asking about the Children Evangelism Fellowship organization. Is that a Christian group?

A Yes.

Q Okay. Is it affiliated with any particular denomination within the Christian faith?

A No.

Q The Christian Evangelism Fellowship organization, is that considered to be of a Protestant Christian denomination in general?

A No.

Q Okay. The Good News Club, where did the name Good News Club originate or come from?

A I have no idea.

Q Okay. Does the phrase, the good news, have any significance in Scripture?

A Yes.

Q Okay. What is the significance of the

phrase, the good news?

A Are you asking what the good news is?

Q Yes, sir.

A According to the Scripture, the good news is that Christ, according to the Scriptures, died [24] for our sins, was buried and on the third day rose again.

Q Is that what is referred to in the title of the club, the Good News Club?

A I would assume so.

Q Okay. Now, in regard to the club and its activities, can you describe for me a typical meeting of the Good News Club?

A Children come into the room, they are asked if they can recite the memory verses from the past week. If they are able to do that, they put their name on the board and they'll receive a prize or candy or something of that nature later on. We then open with a short word of prayer. Then we sing a song. I may get this order mixed up, you know --

Q All right.

A 'Cause, as I said, I'm basically the teacher. And then I believe that it's at that point that we learn -- begin to 'go over the memory verses for that week, and we will play a game that helps them to remember that verse, sort of like a drill. At that point we go to the [25] story, which will present some sort of moral value. Then we -- if we have time -- excuse me, we do have review questions concerning

the story. And then if we have time, we will go over what's known as the missionary story, which is a -- I'm assuming they're fictitious stories that deal with some part of the world where missionary activity is going on. And then we have a drawing for the quiet seat prize. It's just a name that's picked out of a little cup with names in it. And children are -- a child will be awarded for that. There may be -- during the course of Good News Club we may sing another song besides the opening song that we sing. And then the children are dismissed. And there is, of course, other details that -- you know.

Q All right. Now, you indicated in response to one of my earlier questions that there are now over 20 students in the club?

A Yes, sir.

Q Okay. What is the age range of the students that are in the club? [26]

A The youngest are in kindergarten. And I believe that we do have a 7th grader, but I'm not -- I'm not positive that he's a 7th grader.

Q And who can join the club?

A Anybody, any child.

Q Do you have any children of faiths other than Christian in the club?

A We have nonchurch children, if that's the question. As far as -- we don't ask them what denomination or what faith they are.

Q But from what you know of the children who attend, are there any children of the Jewish faith in the club?

A Not that I'm aware of.

Q Are there any children of the Muslim faith of which you are aware of?

A I do not know.

Q Now, when you indicate there are some nonchurch children, what does that phrase nonchurch mean?

A They don't attend church.

Q Okay. And the children who are described as [27] nonchurch children, are those children, however, who would consider themselves to be Christian?

A I have no idea.

Q Now, in order to be a member of the club, is it necessary that the children participate in the various elements of the club activities?

A No, sir.

Q Have you had any children up to this point who have declined to participate in any of the club activities?

A No, sir.

Q Okay. Now, the various verses that are recited at the beginning of the club day or the club meeting period, are those verses from the Bible?

A Yes, sir.

Q Okay. Are they verses from the New or the Old Testament?

A Both.
Q Okay. And in order to get your name on the board and get a prize, is it necessary that the child be able to recite the verse [28] accurately?
A No.
Q Okay. What do you require of the child in respect to the knowledge of the verse?
A Basically that they have a basic knowledge of the verse. We don't expect them to quote it verbatim.
Q And when you go through the verses, do you expect or anticipate that each child will describe in some fashion the verse of the day?
A I'm not sure I know what you're asking.
Q Do you ask the verse of each child?
A No.
Q Okay. Are there some children who then don't participate in the recitation of the verse?
A Yes, sir.
Q How many children in the class do you call on to recite the verse?
A It's just a general -- most of the kids know that's the routine and we just say, if anybody knows their verse, come see, you know, Mrs. Fournier and she'll, you know, listen to see if you know your verse. [29]
Q Okay.
A It's -- it's just -- when they come in, they

know, they know what to do, you know, they know if they know the verse.
Q The way it works, if the child comes in and knows the verse, he will come up to Mrs. Fournier and say, I know the verse, and recite the verse and get his name on the board and eventually get a prize, is that the way it works?
A That's correct.
Q Now, you indicated you open with a short prayer. What are the types of prayers that you open with?
A Be a prayer of thanksgiving, thanking God to allow us to be here, asking Him to bless the meeting.
Q Do you lead the group in that prayer?
A Yes, sir.
Q And other than asking God to bless the meeting, are there other religious references in the prayer?
A I'm not sure I understand the question. [30]
Q Okay. Let me rephrase it then. In the opening prayer, is there mention of or prayer to Lord Jesus Christ?
A Yes, sir.
Q Okay. Is that a part of the typical opening prayer?
A Yes, sir.
Q And in the opening prayer, what specifically are you praying for?
A That God would bless the meeting and,

again, a prayer of thanksgiving that we're together.

Q Okay. Are there occasions in the opening prayer in which you pray that the children will accept the Lord Jesus Christ as their Savior?

A I have never prayed that in the opening prayer.

Q Okay. Are there times in the club meeting when you do pray that?

A When I pray that? No.

Q With the club.

A No.

Q Are there times in any club activity in which [31] there's a general prayer that the children accept the Lord Jesus Christ as their Savior?

A I'm not really sure I understand what you're asking.

Q Okay. Are there occasions during the club meetings when accepting Jesus Christ as their Savior is part of the lesson or part of the instruction?

A Yes.

Q Okay. Can you explain to me under what circumstance that occurs?

A That occurs during the story at some point.

Q Okay. And that's what you describe as the story with a moral value?

A Yes, sir.

Q Okay. Can you give me an illustration of

some of the stories that are used during the club meetings?

A Want me tell you a story?

Q No, perhaps you can just identify --

A Well, I'll just -- example of the last two weeks, the week prior to yesterday we learned the story of Saul and how his jealousy caused [32] him to want to kill David. And this past week, we learned a story of even though Saul wanted to kill David, David's response was to do good to Saul and not take revenge. Thus, the moral lesson was they need to do good to those who try to hurt us.

Q As part of that story, or as part of any of those stories, are you also teaching a portion of the New Testament as well as the Old?

A It depends on the story.

Q Okay. Have there been occasions when you have taught stories from the New Testament?

A Me personally? No.

Q Okay. Do you know whether stories from the New Testament were taught in class meetings or group meetings when you were not present?

A I'm not aware.

Q Okay. Now, in your earlier answer, you had indicated that during the course of the story, there are occasional references to accepting Christ as the Savior. In what way does that -- is that a part of the story-telling or

explanation process? [33]

A Well, because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who have somehow hurt you.

Q Now, you also indicated that you sing songs or that the group sings songs. Are those songs that are sung of a religious nature?

A It depends what you mean by religious nature.

Q Are there references to God or Jesus Christ in any of the songs that you sing in the club meetings?

A Yes.

Q Okay. Are there -- since I asked the question with both, I'll ask the question more simply [34] this time, and that's are there occasions when you sing songs where there are references to Jesus Christ?

A Yes.

Q Okay. Now, you also indicated that you will instruct the children in memorizing a verse.

Isn't that part of your club process?

A Yes, sir.

Q Okay. And the verses that the children are called upon to memorize during the club meetings, I take it those are verses from Scripture?

A Yes.

Q Okay. And are some of those verses from the New Testament as well as the Old Testament?

A Yes.

Q Okay. Now, the games that you play, what are the types of games that are played during the club activities?

A Would you like an example?'

Q If you could, please.

A Well, yesterday, we had a game they call sparkle. And all the kids stood up and they [35] each say one word from the memory verse that we're holding up. And at the end of the verse, the last child will say sparkle and the one next to that child has to sit down. And it just keeps going around until there's only one standing, be that type of game.

Q All right. So it's a game played while going through the verse from the Bible?

A Yes, sir.

Q Okay. Are there other games that are played in the club meetings?

A There may be some games in reference to

the review questions.

Q Okay. What kinds of games, could you describe those?

A Just an example would be the last time we met, we had one child stand behind another child and we asked the question, and whoever answers it first moved on to the next child and so on and so forth.

Q Okay. The games that are played, do they all revolve around teaching the verse that is the subject of the day's lesson? [36]

A No.

Q Would it be fair to say, though, that most of the games that are played are those that revolve around teaching the verse that is the subject of the day's lesson?

A No.

Q Okay. What are some of the other purposes for which the games are played then?

A To get them to understand the story. The moral significance of the story.

Q I'm --

A The moral significance of the story as well as the details of the story.

Q So it relates either to the verse or to the story?

A Yes.

Q Okay. And now the story that you've just been describing, is that different from the missionary story that you were also describing?

A Yes, sir.

Q Okay. What -- could you give me an explanation of the missionary story? [37]

A Briefly, the missionary story for this quarter was of two young Haitian boys, one boy is a --is a -- goes to a Bible study and he invites the other boy to that Bible study, and that boy ends up going and the conflict that it causes with his father, and in the end the father ends up going as well.

Q Would it be fair to say that the missionary stories have to do with spreading the gospel?

A Yes.

Q And now you also indicated that at the -- near the end of the day or the club activities, another song is sung. Isn't that correct?

A I'm sorry?

Q Another song is sung just prior to the end of the club activities?

A At some point within the club activities, not necessarily in the -- at the end.

Q Okay. All right. Now, at the -- as part of the dismissal process, are additional prayers said?

A No.

Q Okay. Is there a concluding prayer of some [38] type that occurred at the end of a club meeting?

A No.

Q Is there any kind of that concluding activity that occurs at the end of the club meeting?

A As I stated, they draw names for the quiet seat prize. We give out the prizes for those who have their names on the board. And we give out what is called the verse tokens, that has the verse that they're asked to memorize during the following -- that week for the following club.

Q What kind of prizes are awarded?

A Candy, pencils, balls. We've given out different little just toys or just little things.

Q Okay. Any of the objects that are awarded as prizes, are any of those objects of a religious nature?

A Yes.

Q Could you give me an illustration of some of the prizes that are of a religious nature?

A Maybe a pencil might say God loves you or [39] something of that nature.

Q How long does the typical club meeting take?

A Typically -- I think it's -- I'm sorry.

Q That's all right.

A I'm just trying to think of when we start. Typically an hour.

Q Is there a particular time at which the club meetings begin and are scheduled to end?

A We begin approximately at 3:00, and that depends on when the people are out of the room. We don't get started until the room is clear. And we strive to end at 4.

Q Okay. What room is the club meeting

currently held at?

A Room number?

Q Yes.

A 119.

Q And is that an elementary classroom?

A I do not know.

Q Okay. And at the end of the club activity at 4:00, are the children then free to go home?

A They're free to go home, but we just don't let them leave. [40]

Q Okay. What is the process for letting the children out of your control?

A We make sure that their parents are there, or the ones who walk, you know, they're dismissed because their parents know they'll be walking home, but for the younger ones especially, they're held until their parents or Darleen and I bring some of the kids home.

Q Okay. Are any of the children transported home by bus after the club meeting?

A No, sir, not that I'm aware of.

Q Now, Mr. Fournier, were you involved with the process of requesting the use of the school facility approximately a year ago?

A Yes.

Q And in the course of that process, did you cause to be submitted an application for building use?

A Did I submit one?

Q Yes, did you submit one?

A Yes.

Q Okay. Now, in regard to the application for building use, what was your reason for [41] requesting the use of the school facility?

A It was two fold. First, and the main reason in what really got it all going was that we were told that the children could no longer ride the bus to the club.

Q Did you inquire about why they could no longer ride the bus to the club?

A My wife did.

Q What information, if any, were you or your wife given as to the reason why they could no longer ride the bus?

A Because there was too many children on the buses.

Q Okay. What was the reason why you chose to request the use of the school facility though?

A Because we couldn't ride the bus, the children had no transportation to the church.

Q Was the church still available for use by the Good News Club if transportation were provided?

A Yes.

Q Okay. Did the club always meet on Tuesdays?

A Yes. [42]

Q Okay. Did you make any inquiry of the school officials as to whether other transportation arrangements could be made

so the club could meet perhaps on Tuesday or another day of the week?

A No.

Q Did you have any meetings with any school officials concerning the determination with regard to transportation for the club members?

A We never met with them, no.

Q To your knowledge, were there any conversations between you or your wife with school officials concerning the transportation issue?

A My wife spoke with someone concerning that issue.

Q Okay. Do you know the substance of any of those conversations?

A The substance was that the children would no longer be allowed to ride the bus to the Good News Club because there was too many people on the bus.

Q All right. Were you given any information [43] about alternatives that were available other than using the school building for your meetings?

A By whom?

Q By school officials.

MR. MARCELLE: Could you define that item for me?

MR. MILLER: I'm assuming we're talking about the superintendent, any principal, board members, those persons.

A I did speak with a board member, yes.
Q Okay. Did you have a conversation concerning alternatives in regard to the transportation question?
A His alternative was for us to meet at the Presbyterian church, which is no longer a church. It's owned by the Historical Society, which this board member happened to be president of, and they would charge us to use that building. And the kids were told that they could walk down there, which we found the whole thing to be unacceptable.
Q Okay. Who was the board member with whom you [44] had spoken?
A Jim Haverner.
Q Could you say --
A Jim Haverner.
Q Did you explore other alternatives in regard to other places for the children to meet for the Good News Club?
A No, sir.
Q Now, did there come a point in time at which you learned that the school officials would not make the premises available to you for your club activities?
A Yes.
Q Okay. When did you first become aware of that?
A You want the date?
Q As best you can recall. It doesn't need to be precise. If you can recall an approximate

date, that would be fine.
A I'm not sure. I'm not certain. If I saw some of the correspondence that I have with Dr. McGruder I could tell you, but I don't want to say a month and be off. So – [45]
Q Okay. Well --
MR. MILLER: Well, why don't we do this then. Let's begin there.
THE WITNESS: Okay.
MR. MILLER: If you want us want to have that one marked as an exhibit, that's a copy of our response to your interrogatories. You should have a copy of that already in your possession.
MR. MARCELLE: I do. You know, maybe if we just for the record refer to it as whatever the exhibit number is in our papers are so we -- if it's already marked as an exhibit number -- for example, this, I think, is Exhibit 1 in your response to interrogatories.
MR. MILLER: But that's one of several pages. If you prefer to have that marked, just for purposes of clarity, I think I may have another copy of that though.
MR. MARCELLE: I have your response so I have a copy he can look on.
MR. MILLER: Look here, let's do it [46] this way so it doesn't get confusing. Why don't we trade that. If you hand me that other item back, then we'll have this marked as an exhibit.

(Defendant's Exhibit A marked for identification.)

Q Showing you what has been marked as Defendant's Exhibit A and ask you if you can identify that for me?

A It's the use of facility request form.

Q And that was the form that was completed apparently by your wife?

A Yes, sir.

Q Okay. And do you understand that to be the original building use request form that was submitted in September of 1996?

A Yes, sir.

Q Okay. Now, at the top of Defendant's Exhibit A, it refers to the Child Evangelism Fellowship as the name of the organization. That's the same organization as you were referring to earlier in your testimony?

A Yes, sir. [47]

Q Okay. What do you understand the phrase evangelism to mean?

A Evangelism would be introducing children to Jesus Christ.

Q And what do you understand the word fellowship to mean?

A Meeting downstairs in the church and having dinner.

Q But in this particular case, does it have any particular significance?

A Not for me, no.

Q All right. And it lists here the title of the

Evangelism Good News Club. Is that the way the club has always been described, to your knowledge, as the Good News Club?

A To my knowledge, yes.

Q Now, if you would please take a moment and review the portion of the document following the phrase, purpose of the event.

A (Witness complies with request.) Yes, sir.

Q Is that writing there which follows the phrase, purpose of the event, is that an accurate description of what the Good News [48] Club was doing?

A It would be a very general description, yes.

Q Now, in addition to that, was there anything else submitted with this application, do you recall?

A I do not recall. I do not believe so, but I don't recall.

MR. MILLER: Get that marked.

(Defendant's Exhibit B marked for identification.)

MR. MARCELLE: Just keep this for a second, Frank.

MR. MILLER: Oh, sure.

Q Referring your attention to Exhibit B, are you familiar with this document?

A I possess a copy of this, yes.

Q All right. Was this document or one similar to it submitted in connection with your application for building use back in 1996?

A No, sir.

Q Was a certificate of liability insurance submitted at any time in connection with your request for building use? [49]
A This year, yes.
Q Okay. Would that be Exhibit B?
A I-- we did not submit it personally.
Q Okay. Do you know who did?
A I am -- I cannot say for sure. I assume that it was Ted Webb.
Q Okay.
A That was --
Q Do you know how Exhibit B came to be in existence?
A We were asked for a certificate of liability insurance from Mr. Livshin.
Q And when did Mr. Livshin make that request?
A That would be at the beginning of this school year.
Q Okay. And when you received the request from Mr. Livshin for some form of liability insurance coverage what, if anything, did you do about it?
A We got in contact with Ted Webb and asked him if we had liability insurance. He informed us we did and we requested a certificate be sent to the school. [50]
Q And to your knowledge, is that how Exhibit B came about?
A To my knowledge.
Q Who supplied the information that appears

at the bottom of Exhibit B?
A Description of operations?
Q Yes, sir.
A I have no idea, but it's in error.
Q All right. In what way is that an error?
A Good News Club is in no way church-sponsored.
Q Who sponsors the Good News Club then if the church doesn't?
A It's my wife and I.
Q Your wife and I -- your wife and you are the sponsors of the Good News Club, is that what you're telling me?
A Maybe you should define sponsor.
Q Well, it appears on the document and I'm asking you if that's accurate in the description. You've indicated that it was an error --
A That's true.
Q -- in reference to the sponsorship. And what [51] I'm asking you is, is that then, if it's an error, in what way is it an error? And you indicated that it was because the church doesn't sponsor it. What I asked you then was who does sponsor it. Are you able to answer that question?
A I don't know if you defined sponsored, but we are the ones who initiated the Good News Club to come to here. We are the ones who provide funds. We are the ones who privately, my wife and I, provide means of --

we get together the prizes, we do all that sort of thing. So if that's what you mean by sponsored, then we – my wife and I are the sponsors of the Good News Club.

Q What relationship, if any, does the Child Evangelism Fellowship organization have then to you?

A Again, they provide the material, they provide support, training, and we would be under their -- their guidance, their rules and their restrictions or whatever. We would fall under them. You know, if we weren't doing something [52] proper, they would say, you know, you need do it this way and not that way.

Q Okay. But it is listed on here that the insured is the Child Evangelism Fellowship organization from Ontario, New York.

A Um-hum.

Q Are you an employee of that organization?

A No, sir.

Q Are you an agent of that organization?

A I don't know.

Q All right. Are you named anywhere in this certificate of liability insurance as a person who is either a sponsor or an insurer?

A No, sir.

Q Okay. What relationship, if any, then do you have with the Child Evangelism Fellowship organization from Ontario, New York?

A I'm not sure what legal term I would fall

under.

Q Okay.

A I know I've had to sign forms for them in regards to my character and that kind of thing. So I guess -- I don't know whether [53] legally I'm an agent or not. I do not know.

Q Okay. Are you paid a salary for teaching at the Good News Club?

A No, sir.

Q All right. Are you given any kind of remuneration or compensation for that at all?

A No, sir.

Q Are your expenses reimbursed by anyone?

A No, sir.

Q Does the Child Evangelism Fellowship organization have any relationship to the church at which you are pastor?

A No, sir.

Q Does the Child Evangelism Fellowship organization have any relationship to the Village Missionary organization?

A No, sir.

Q Now, when you spoke with Mr. Webb, did Mr. Webb tell you that you were covered by this policy of insurance?

A I personally did not speak with Mr. Webb.

Q Do you know who did?

A My wife. [54]

Q Did your wife tell you what information Mr.

Webb had relayed to you about the insurance coverage?

A That he would send a certificate of insurance to -- to school, and we would receive a copy.

Q Okay. But referring back to the building use request form which you have before you as Exhibit A, the name of the organization is, again, listed as the Child Evangelism Fellowship organization, isn't that correct?

A That's what it says, yes, sir.

Q And the name of the insured on Exhibit B is listed as the Child Evangelism Fellowship organization?

A Yes, sir.

Q Isn't that also correct?

A Yes, sir.

Q On Exhibit B, there's nowhere listed your personal involvement within this matter; is that correct?

A You're referring to Exhibit B as –

Q Yes, sir.

A -- as if that is the certificate that is now [56] in force when that is not. This -- we had another certificate sent to the school with the proper listing and the description of organizations because we were made aware that this one was -- that one was in error.

Q Then what was the error then?

A Church-sponsored.

Q Okay. So it was otherwise accurate in all other respects; is that correct?

A As far as my knowledge, yes.

Q Okay. And you don't know what relationship, if any, you have to the Child Evangelism Fellowship organization; is that correct?

A I am not aware of what it would be referred to legally, no.

Q Now, earlier you had mentioned that the man you had contact with was Ted Webb from Afton, New York, I believe you said?

A Yes, sir.

Q But this organization lists its address as Ontario, New York?

A I also stated that Ted Webb was the tri-county director of CEF. [56]

Q All right. And the organization that's based in Ontario, is that where its home office is?

A I don't believe so, but I'm not -- I'm not certain.

Q Do you know what the organization from Ontario, New York is?

A Do not.

Q Have you had any dealings with that organization?

A I've had dealings with CEF, not for anyone that I recall from Ontario, New York.

Q Okay. Now, are you familiar with the Church Mutual Insurance Company?

A Yes, sir.

Q Okay. And in what way are you familiar with the Church Mutual Insurance Company?

A It's a twofold. I am aware of them in that I spoke with them regarding this certificate, and I also am aware of them because that is where my church gets its insurance from as well.

Q On what did you speak with Church Mutual about in regard to this certificate? [57]

A I called to speak with Doug Smiley, who is no longer there, to my knowledge, and spoke with his secretary and told her that the Good News Club was not in fact church-sponsored and we would like to get a new certificate of liability insurance issued with a correction made in that area.

Q And was a new certificate issued after your conversation with Mr. Smiley's office?

A Yes, it was.

Q Okay. Now, you had indicated the same insurance company also insures the church at which you are pastor?

A Yes, sir.

Q Okay. Now, at some point in time, after you made this application for building use, did there come a point in time at which you had some conversations with Dr. McGruder concerning your building use request?

A Yes, sir.

Q All right. What was the first of those conversations that you had with Dr. McGruder?

A What was the first? [58]

Q Yes. Do you recall the first conversation you had with him about the building use request?

A I -- I don't know if I recall. I spoke with him on different occasions. As far as what was first and second, I could not tell you.

Q Okay. What's your best recollection of what you can recall discussing with him first?

A I had called or he had called, I'm not sure which one, regarding the use of facility. He had said that he had gone through this before with some priest up somewhere and that he had denied him. So he didn't see how we were going to be allowed to use the school. They weren't really pleasant conversations.

Q Can you tell me what, if anything, was unpleasant about the conversations?

A Well, for instance, he said that -- I asked him if I could get a copy of the school policy. He said he didn't have the school policy. He then began to tell me what it said, and then he said, hold on a minute and I'll read it to you. It's evident that he was lying to me for some reason. He did not want [59] me to have a copy of the policy. I asked him if we could come in and sit down and talk. He said, no, it wouldn't be necessary, I do not wish to discuss it, and that he would -- he was going to be talking with the board concerning this.

Q Was anything else discussed in the conversation between you and Dr. McGruder that you can recall?
A Not -- not offhand. I'm sorry.
Q Okay. Can you describe for me his tone of voice when he spoke to you?
A He was very abrupt. I thought he was rude.
Q Did there come a time that you exchanged some written correspondence with Dr. McGruder in connection with this matter?
A Yes, sir.
Q Okay. Do you recall what you did in that?
A Not offhand. I would have to see the correspondence to -- could it be possible for me to use the restroom?
MR. MILLER: Oh, absolutely. Why don't we take five. [60]
(A short recess was taken.)
Q I believe we left off, I was asking you some questions about correspondence with Dr. McGruder. Am I correct that you had some written correspondence with Dr. McGruder?
A Yes, sir.
MR. MILLER: Might as well mark that, if you don't mind.
(Defendant's Exhibit C marked for identification.)
Q I'm showing what has been marked Exhibit C and ask you if you can identify that document for me?
A This was a letter that was enclosed with

some information sent to us by the Rutherford Institute regarding what we believed our rights were in this matter.
Q Did you forward that to Dr. McGruder after you had spoken to him concerning your original request to use the building?
A Yes.
Q Okay. And was that letter also forwarded to him after the time that you had spoken to him [61] in the conversation that you just described a few minutes ago?
A I believe so, yes.
Q Did Dr. McGruder make a response of any kind to that letter?
A I believe I spoke with him on the phone following that letter, yes.
Q Can you describe for me please what, if anything, took place during that phone conversation?
A He said that it didn't matter -- basically I'm just not -- you know, not verbatim, but it didn't matter, that he did not believe what the Rutherford Institute had stated applied in this circumstance. In fact, he equated the Rutherford Institute with the Clark Foundation, which I don't know how he arrived at that, but --
Q What did you understand that to mean?
A I understand that to mean is he didn't care who said what, we weren't using it. That was his tone. That was basically the gist of what

I was getting, that it didn't matter what [62] information was sent, we would not be using the building.

Q Okay. Do you recall anything else from the conversation with Dr. McGruder?

MR. MARCELLE: Sorry. This is the second conversation we're talking about?

MR. MILLER: That's correct. We're talking about this conversation, the second conversation?

A It may have been the second or third time we spoke on the phone.

Q But in the conversation that we've been talking about, which was subsequent to Exhibit C, what I want to know is was there anything else discussed in that phone conversation?

A I don't believe so, just the fact that the information that we had sent was not pertinent to this case or to this situation and we weren't going to be allowed to use the building.

Q Did Dr. McGruder give you any additional reasons or rationale for the position that he had taken? [63]

A There were at times when he said that this was -- worship was not allowed in the school or in any of the school facilities. And he had stated that, in his opinion, was worship.

Q Did he give you some indication as to why he was expressing that particular opinion, what

was it that led him to the conclusion that it was worship?

A He may have referred to the purpose of event on the use of the facility request form. I think he made reference to that.

Q Okay. Do you recall what specifically he identified as the purpose that he found objectionable?

A Specifically, no, sir.

Q Now, after your phone conversation with Dr. McGruder following the letter, which is before you as Exhibit C, what occurred next in the sequence of events that brought about this litigation?

A I believe we once more got in contact with the Rutherford Institute. They said that they were interested in helping us to go forward in [64] this issue, and that they would, I guess, put us in touch with a lawyer from the area who they felt would be competent to handle the case.

Q Did you have any further conversations with Dr. McGruder?

A Not that I can recall.

Q Okay. Other than Dr. McGruder then, did you have any conversations with other school officials, such as the board members or principal --

A Yes.

Q -- or persons of that sort?

A Yes, sir.

Q All right. Can you tell us who you spoke with?
A I spoke with Jim Haverner, I think that's how you pronounce his name. I'm not sure.
Q A board member?
A Was he president of the board at the time? Yes.
Q When did the conversation with Mr. Haverner occur? [65]
A It took place, I believe, after the first conversation with Dr. McGruder.
Q And what, if anything, was discussed by you and Mr. Haverner?
A The use of the school building was discussed.
Q Was the conversation in person or by telephone?
A It was by telephone.
Q Okay. Did you initiate the call or did he?
A I believe I did. My -- my interest at that time was to sit down with the board and Dr. McGruder and just speak with them.
Q All right. What, if anything, did Mr. Haverner say to you in the conversation you had?
A Basically -- and again, I don't recall the conversation, you know, I recall certain aspects and parts of it, but basically it was that they felt that because our club was religious in nature, that it was against the school board policy for us to use the facilities.

Q All right. What response, if any, did you [66] make to Mr. Haverner when you -- when he said to you that he would not let you use the facility because it was religious in nature?
A Well, I told him that we would -- that we were going to push the issue, basically, that we were going to go forward and if it took legal action -- I'm sorry. If it took legal action, that we would, you know, pursue that avenue, that we felt that this was within our rights to meet at the school.
Q Did you at any time disagree with Mr. Haverner's description of the club as religious in nature?
A No.
Q How about when you spoke with Dr. McGruder, did you take issue with his claim that the club was religious in nature?
A I took issue of the fact that he was saying it was worship.
Q What did you say in that regard?
A It's not worship.
Q I guess that sums it up. Did you give any explanation as to the club activities or -- [67]
A I don't recall the exact words, but I just -- didn't, you know -- being a pastor, I understand or I have an understanding of what I believe worship to be, a worship service, as it was referred to. And what we do at Good News Club is, again, teaching moral values from a Christian perspective.

It's not in my view in any remote sense religious worship.

Q Did you explain that to Dr. McGruder when you spoke with him?

A I don't recall. I don't know -- I doubt I used those exact words. Our conversations were not lengthy for the most part, and they really didn't get into the why's, it was basically it's against school policy, it's religious in nature, you're not using the building.

Q All right. Do you disagree with the idea that the Good News Club is a club that is of a religious nature?

MR. MARCELLE: Never mind, go ahead.

A See, it depends on how you define religion. [68] And people define it in different ways and in different contexts, and also even I will define it differently, depending on who I'm speaking to.

Q Well, insofar as what you know of the club using your definitions, is it your conclusion that this is a club that is -- that engages in activities of a religious nature?

A I would say yes, in a religious nature that religion is, you know, just an acceptance of a set of standards, of a set of beliefs.

Q Of course. And when you indicated that it was teaching moral values from a Christian perspective, are those moral values in your judgment meaningful if the person being taught those values does not accept the

tenants of Christian belief?

A What makes them meaningful, in my opinion, is a Christian perspective, is the fact that you need a relationship with Christ to fulfill them the way God would have you fulfill them.

Q Does the club, insofar as you instruct it, is the club instructed in what you just [69] described, and that is that the moral values are only meaningful with the relationship of Christ?

A I don't think I said that they're only meaningful, I said they were only meaningful to God. They're only meaningful in that they're his standards.

Q Okay. Do you teach that as part of what you teach in the Good News Club meetings?

A That's the Christian perspective, yes.

Q Exactly. In any of your conversations with -- or excuse me, your conversation with Mr. Haverner, did you have a discussion about the religious perspective of the club?

A Not to any great length. He was basically -- that conversation basically ended with him saying, you need to talk to Dr. McGruder, and basically that he was the one who I was to deal with.

Q Now, the conversation that you've just described, was that the conversation where he mentioned possibly using the Presbyterian church, or was there an

additional [70] conversation?

A That was later on. I guess there was an additional conversation because I don't believe it was at that point that he had mentioned that.

Q All right. So sometime later you had a subsequent conversation with Mr. Haverner?

A I'm not sure if it was -- it was myself who had the conversation or my wife, I'm not sure. I know it was offered to us at some point in time.

Q All right. The best of your recollection then is that you had had one and possibly a second conversation with Mr. Haverner?

A Yes, sir.

Q But no more than that; is that correct?

A I don't believe so.

Q Okay. Did you have any conversations with any other board members about your application to use the building?

A I don't recall. I do not believe so.

Q Okay. Did you have any conversations with any other school administrators, like the [71] principal or --

A The administrators?

Q Yes, sir.

A No, I don't believe so.

Q Okay. Did you have any conversations with any school teachers at the Milford Central School District about the use of the building for the purpose of the Good News Club?

A In general terms? Yes.

Q Yes.

A Yes, yes.

Q When you say in general terms, were any of those conversations about your request to use the building and the reasons that they have been denied?

A Yes, and what we were going through.

Q All right. With whom did you speak?

A Bill Hasley.

Q Anyone else?

A

it and, you know, just general -- general things like that. It wasn't a debate or discussion as to, you know, what constitutes Good News Club, what doesn't, any of that. It was just a general --

Q Did Mr. Hasley say anything about the school's decision not to allow you to use the facility?

A Yes, I believe he did.

Q Okay. Do you recall what, if anything, he said to you?

A I believe he said he didn't understand why that they would deny us.

Q Did he say anything else about it?
A No.
discussion between friends, not between a teacher and an individual.
Q Okay. Did there come a point in time in which you appeared before the Board of Education to take your case to them?
A No, sir. [73]
Q Did there come a point in time in which you spoke with any other representative of the school district regarding your building use request?
A It wasn't until I spoke to Mr. Livshin this past September, I guess.
Q What were the nature of your conversations with Mr. Livshin?
A We had just gone in to ask what room we would be using and just basically to make sure everything was straightened out and, you know, there were no misunderstandings going on.
Q Okay. And what, if anything, did Mr. Livshin say to you?
A He was very cordial, he brought us down to -- he showed us the room, asked us if that would be acceptable and if it had enough room and chairs and so forth and -- and that was -- that was about it.
Q Okay. Did there come a point in time in which the discussion occurred regarding the liability insurance issue?

A Yes. I'm sorry. Yes. [74]
Q And it was in that conversation that he raised that?
A It was in that conversation that he asked if we had a certificate of insurance, and we told him that we would look into that and we would get him one.
Q Okay. Any other conversations with Mr. Livshin about this matter, and that is the use of the school building by the Good News Club?
A Not to my knowledge.
Q Okay.
MR. MILLER: Can you have that one marked?
(Defendant's Exhibit D marked for identification.)
Q Would you please take a moment and examine Exhibit D?
A
Q Have you had a chance to review that?
A Yes, sir.
Q I'm showing you what has been marked as Exhibit D. Do you recognize this document?
A Yes, sir. [75]
Q Okay. What is it?
A It was a letter that was written to Dr. McGruder on March 14th that basically was given to avoid any misunderstanding that they might have as to what the Good News Club was.

Q Now, was this issued after the court injunction was issued, as best you can recall?
A No, sir, I do not believe so.
Q What was the purpose then in writing or sending this letter, as far as you know?
A I believe this letter came at the request of a lawyer to make sure that they understood what we were doing.
Q All right. And have you -- in reviewing this document, is there anything in it that you would disagree with about the purpose or what the Good News Club does?
A I do not disagree, no.
Q Okay. Is that an accurate description of the activities of the club?
A The activities, yes.
(Defendant's Exhibit E marked for identification.) [76]
Q Have you had a chances to review Exhibit E?
A Yes, sir.
Q And I refer your attention now to Exhibit E. Can you identify that document for me?
A It was the use of facility request form that was filled out at the beginning of this school year, September, excuse me.
Q And it indicates that the name of the organization is the Good News Club.
A Yes, sir.
Q And unlike the prior use request form, it does not refer in any way to the Children

Evangelism Fellowship organization. Is there a reason, to your knowledge, for that change?
A No, sir. It was just a -- she just -- that's just the way she wrote it out. There was no --
Q You're still connected to the Children Evangelism Fellowship organization?
A Yes, sir. We're still under their material, their training, I guess their way of doing things.
Q And it was listed that the purpose of the [77] event was to teach Bible stories, play review games, sing songs and memorize Scriptures. Is that also an accurate description?
A For the most part, yes, sir, general.
Q Okay.
(Defendant's Exhibit F marked for identification.)
Q Have you had a moment -- please take a moment and review Exhibit F, if you would please.
A (Witness complies with request.) Would you like me to read all this?
Q It's not necessary that you read it all, I'd just like you to review it so that you're at least somewhat familiar with what's there.
A Okay.
Q Have you had an opportunity to do so?
A Sure.
Q All right. Now, referring to Exhibit F, can you identify what this is?

A No. I know it comes from CEF material, but this is the first time -- or I shouldn't say this

read through it. [78]

Q

copy of the materials that your attorney supplied to us from the Child Evangelism Fellowship organization that you use as teaching materials.

A Right --

Q Do you need a copy of that?

A I am familiar with that. I've not read everything that is contained within that manual.

Q I understand. According to my copy, this would be the first page inside that booklet of materials.

A Okay, yes.

Q Do you identify this as coming from that booklet of materials?

A Yes, sir.

Q All right. And is this part of the reading materials that the teacher uses to instruct the Good News Club?

A I guess it is. I've not read it, but apparently that's what it's for, yes.

Q Okay. Was this book which your attorney had [79] included in materials sent to us, was this book in -- was this book used by you to instruct the Good News Club?

A Yes, it is.

Q Okay. And have you gone through this portion that's before you as Exhibit F concerning the initial phase that's called, let's get started?

A Prior to today?

Q Yes, sir.

A No, sir.

Q Have you ever used the book to instruct the students in the class?

A I used the material that's contained in the book, yes, sir.

Q But you're not familiar with this particular page is that what you're saying?

A That's exactly what I'm saying.

Q All right. I would, however, like to ask you some questions about Exhibit F, and it indicates that in the margin -- near the left-hand side, the column that's boxed off there, indicates that in the margin of each [80] lesson, you will find the following symbols. Are you familiar with those symbols from having used the teaching materials?

A I've not really noticed them.

Q

it appear to you that those symbols have appeared in the teaching materials throughout this booklet?

A I would have to look at the book itself. I just -- I don't --

Q Would you like to take a moment to do that?

A If you would like me to

Q I can give you my copy --
MR. MARCELLE: I'll give him mine.
A You just want me to take note if those symbols are there?
Q That's correct.
A Yes, those symbols are presented throughout the teaching manual in the book.
Q Now, is there a teaching -- or is there a symbol in the teaching manual that's listed in the left-hand column there about an invitation for a child to receive Christ? [81]
A Yes, there is, in the book.
Q Is there also a symbol there for God's concern and his love for the child?
A Yes.
Q All right. Is there also -- is there also a symbol there for the saved child application?
A Yes, there is.
Q And is there also a symbol there for God's solution or way?
A Yes, sir.
Q And how about the child's problem of sin?
A Yes, sir.
(Defendant's Exhibit G marked for identification.)
Q Would you please take a moment and examine Exhibit G briefly.
A (Witness complies with request.) Okay.
Q Now, are you familiar with Exhibit G?
A No, sir.
Q All right. Well, can you identify Exhibit G as

coming from the teaching materials that we've identified earlier as --
A Yes. [82]
Q -- materials of the Child Evangelism Fellowship organization?
A Yes, it comes from them.
Q Okay. And would that be the third page or third chapter of the teaching materials that are in there?
A It would be the third page apparently.
Q Okay. And does this appear to have been a lesson that was suggested by the materials on how to lead a child to Christ?
A It says, how to lead a child to Christ.
Q Is that a lesson that you taught in the Good News Club or materials that you used in presenting at the Good News Club?
A No, sir.
Q All right. Have you ever used the material that's contained on page 3 for purposes of conducting a session or a class of the Good News Club?
A No, sir.
Q Why is it that you haven't used this particular item?
A
Q Okay. Which are the parts of the materials that are part of the curriculum?
A Curriculum I believe begins on page 5, lesson 1.
Q What was lesson 1 about in the materials?

And if you need a copy, I'll be glad --
MR. MARCELLE: Use my copy. When we just say materials, just so it's clear, we're talking about David, a man after God's heart, which I think is Exhibit T to the discovery. Just so -- I think there's a bunch of material that he had, a lot of charts and stuff that they've sent him. And we're talking about the instruction booklet which is entitled, David, a man after God's heart.
MR. MILLER: Okay.

Q Examining lesson 1, are you able to tell me what that lesson is about?

A It is about Israel demanding a king.

Q And is there a -- it's correct, is it not, that at page 5 of the materials there's a schedule or a lesson -- and also a lesson overview. Did you follow that lesson [84] overview?

A I personally did not teach this lesson, but -- we do follow the outlines.

Q Who taught lesson number l?

A I would believe that would have been my wife.

Q All right. Do you know if she followed the lesson overview?

A Probably safe to say she did.

Q Okay. Which lessons did you personally teach?

A I taught one on David and Goliath. I taught lesson 5, lesson 6, lesson 5 begins on page 33. That's the one that I would be familiar with.

Q That's the lesson that you --
MR. MARCELLE: Can I just have one minute to --
MR. MILLER: Sure, sure.
(Pause in the proceedings.)

A If I can make this clear in that during the beginning of the year, Darleen and I both did the teaching aspect, and then my wife felt it was too much on her because she had other commitments and other responsibilities, so I [85] took over teaching exclusively.

Q Okay. So going back to lesson 1 then, were you present when lesson --

A Yes, I was.

Q -- when lesson 1 was taught. All right. Just let's see if I can get some things clear in my mind about what occurred with regard to lesson 1. Is it your recoilection that the lesson overview was followed for the lesson on Israel demands a king?

A Yes, I would assume so, sure.

Q Now, in the outline, there's a portion that relates to a conclusion. Would you please take a moment and review that?

A (Witness complies with request.) Yes, sir.

Q Now, what does it refer to when it says challenge, parens, saved child and invitation, parens, unsaved child. What do you understand those phrases to mean?

A We would challenge the children. We would

basically say, if you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior [86] and if you would like to, then we will -- we will pray with you separately, individually.

Q All right. At what point in the lesson is that or was that conclusion discussed or presented?

A At the conclusion of the lesson, at the end of the story.

Q Okay. And are you able to tell from the schedule of materials what particular verses or passages from the Bible were discussed?

A No. As far as songs, the memory verse, of course, would be the same, but the songs would be different, if that answers your question.

Q Yes, but it indicates in the schedule, for example, that there's a reading from Ephesians. Is that the reading that was done for the memory verse?

A That would be the memory verse itself, yes.

Q Okay. And the songs, it refers to a Good News Club theme song.

A Yes, sir.

Q Is there a place in these materials where the Good News Club theme song is described or [87] written out?

A I believe we gave that to you.

Q It's in the booklet, isn't it in the teaching

materials?

A I don't believe it's in the teaching materials themselves. The teaching materials come as a packet of materials. We could sing it for you.

Q Well, if you can't find it --

A I could describe it for you.

Q Why don't we do that. Can you just describe it?

A It's basically a poster size -- it's probably maybe 30 inches by 30 inches and it's like a book, big book. And it just has the words to the song. And I don't know as we sing it real well, but --

Q Can you just describe the words that are in the song?

A Good news, that's what we're singing about, good news. I'm just drawing a blank here.

MR. MARCELLE: Maybe we can just go off the record for a second. [88]

MR. MILLER: Sure.

(Discussion off the record.)

Q Are there any religious references in the theme song of the Good News Club?

A What do you mean by religious references?

Q Are there any references to God?

A Yes.

Q Or Jesus Christ?

A Yes.

Q Are there references to just God or Jesus Christ or both?

A I know there's references to Jesus Christ. I'm not sure if it's God. It's possible.

Q All right. Were you also present during the teaching of the -- of the second lesson entitled, Saul's disobedience?

A I believe I was.

Q All right. And again, did that -- did that lesson have a conclusion, which I think you'll find on page 13 of the materials?

A Yes, sir.

Q And again, could you explain the difference between the challenge for the saved children [89] and the invitation for the unsaved children?

A Challenge for the saved child, it would be presented as to ask God for strength to obey him completely. And then we would give an invitation that if you would like that strength to obey God and you would like to ask Jesus as your personal Lord and Savior, come up and talk with us or Darleen and we'll pray with you.

Q All right. Now, up in the -- on page 13 of the materials, there's a section entitled, lesson overview.

A Yes, sir.

Q And it has a highlighted portion there called, emphasis for the unsaved. What does that refer to?

A I believe that emphasis is always the same, and that's for them to believe on the Lord

Jesus as their Savior.

Q Now, I'd like to refer your attention to page 18 of the materials. On page 18 of the materials, there's a section entitled challenge and a section entitled invitation; [90] isn't that correct?

A Yes, sir.

Q Now, in regard to that -- those two sections, challenge and invitation, does that relate to the summary that we looked at on the first page of the lesson?

A I believe it would, sir.

Q Okay. Is that the same challenge and the same invitation that you described earlier?

A The challenge would be for the kids who know God to -- in order to apply the moral values, they -- to use the strength of God. And also the invitation would be if these children, if they don't know the Lord as their Savior, in order to overcome jealousy or to obey God or whatever value we're speaking of, they would need to have ask Jesus into their lives.

Q Now, over to the left-hand column there's a symbol of a heart.

A Yes, sir.

Q And there's also some written material there concerning -- concerning the invitation. Is that the same type of invitation to come to [91] know Christ as it was referred to in the invitation you discussed earlier?

A I have not read that section. I don't believe I ever read anything within the -- within the margins of this material.

Q All right. Well, if you would please take a moment in the little section there that is noted by the heart shape, would you please read that?

A Would you like me to read that aloud?

Q No, no, just please read that to yourself. I want to ask you questions about that, if I may.

A (Witness complies with request.) Okay.

Q Now, would it be fair to say that the note there in the margin is inviting the instructor to invite children to come to know Jesus Christ as their Savior?

A That's what it's saying.

Q All right. And then the next paragraph down it says, if your teaching situation won't allow for individual counseling, you may instead address the group. Do you understand [92] that to mean that the instructions here and in the club manual suggested that perhaps you should announce to the group as a whole the material that's listed here? Is that what you understand that to be?

A Listed where?

Q Well, the material in the left-hand column here talks about either doing individual counseling or announcing to the group as a whole.

A Yes, sir. We always do individual counseling.

Q Okay. How is it that you know who the saved children are versus the unsaved children?

A I have no way of knowing that.

Q All right. How is it then that you say to the children, those of you -- how do you carry out the challenge and the invitation? Is that done by an instruction to the class?

A Yes.

Q As a whole?

A As a whole.

Q Can you give me an illustration of how you handled the instruction in the second lesson [93] concerning the challenge and the invitation?

A We would, again, say -- and I would have to refer to what this -- what the emphasis is on in this particular --

MR. MARCELLE: Page 5.

MR. MILLER: I think we'll go back to page 13.

MR. MARCELLE: I'm sorry. You're right, page 13.

A We would put that challenge and that invitation within the context of obeying God and his word. And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey him. And those of you who do not know the Lord Jesus as Savior, do not have him in your

heart and would like to receive him as Savior so you can obey God the way he wants you to, and if you would like, we have them either raise their hand or just go and see Darleen.

Q Okay. Are there occasions in which some of the children will raise their hand and then request private assistance during the -- [94]

A Whenever they raise their hands, they're dealt with privately.

Q Okay. And the invitation or the challenge, however, is offered to the class as a whole, is it not?

A Yes.

Q Okay. Now, beginning on page 20 of the materials that you have in front of you, there's a chapter there concerning God choosing David to be king, correct?

A Yes, sir.

Q Were you present either participating in the presentation of the lesson or present while it was being presented?

A To my knowledge, yes, I was.

Q Okay. Were you presenting or were you just present in the room?

A I believe I would have been present at this.

Q What was this lesson about?

A This was a lesson about God choosing David to be king over Saul.

Q And again referring to the materials on page 20, the conclusion section, what was the

[95] challenge and the invitation there?

A The challenge, again, we would present it to the children that if you know Jesus as your Savior, God will use you, if your heart is right with him, if you desire to do what he wants you to do, and we would from there say, if you do not know the Lord Jesus as your Savior and you would like to so that you too may obey God and have your heart right with God, raise your hand and we will speak with you privately or pray with you privately.

Q Okay. What was the -- do you recall or can you tell from examining this document at page 20, can you recall what the specific memory verse was for that class?

A According to the material, it would have been I Samuel 16:7.

Q And was there a particular theme to this lesson or particular moral to this lesson?

A That God will use you if your heart is right with him.

Q Okay. I'd like to next refer your attention to page 26 in the materials. That is, as I [96] understand it, lesson 4. I believe the title of that is, God gives David a victory. Is that accurate, is that what lesson 4 is?

A Yes, sir.

Q Now, were you present for this presentation or this lesson?

A I believe I taught this.

Q All right.

A And may I just clarify that in that I didn't go by the lesson plan here because I was familiar with the story to an extent that I've taught it on many occasions to children that I did it kind of on my own.

Q All right. Did you follow the general format that was described -- that is described here on page 26?

A As far as memory verse and main teaching emphasis?

Q Yes, sir.

A Yes, sir.

Q Okay. Did you also go through the conclusion portion near the end of the -- end of the lesson? [97]

A I don't recall, but may very well have.

Q Okay. Was that a regular part of the way that you handled the lesson or the instruction in the class?

A As far as the --

Q The conclusion.

A The invitation and challenge?

Q Invitation and challenge.

A Yes, sir.

Q So there would have been an invitation and a challenge near the end of this lesson as well, correct?

A Yes, I would say so.

Q And I take it then, and I don't want to be terribly repetitive, but would the challenge and invitation be similar to what's listed on

page 26?

A We would have challenged the children if they know Jesus to count on God to give them courage and not to be afraid, and the children, again, that if they would like to receive Jesus Christ as their Savior, they might have the courage that God desires them [98] to have, yes, sir.

Q Okay. I'd like to next refer your attention to lesson 5.

A Page 33.

Q And lesson 5 is at page 33?

A Yes, sir.

Q And is that lesson entitled, jealous Saul tries to kill David?

A Yes, it is.

Q And did you teach this lesson?

A Yes, I did.

Q And what was the main theme of this lesson?

A Jealousy.

Q And can you explain to me how you used the story here to teach a lesson about jealousy?

A The story is a story of Saul, and Saul was king of Israel. And he became jealous of David because David became more popular, and he sought to kill David because of his jealous rage.

Q All right. Was there a challenge and invitation at the end of this lesson?

A Yes, there was. [99]

Q Can you describe for me what the challenge

and invitation were in this lesson?

A Challenge was that we can ask God and go to him to help us with our jealousy, and again, if you don't know Jesus as your Savior and you would like him to come into your life and help you deal with jealousy, then raise your hand if you would like to do that.

Q Okay. Is there also in the materials here at page 38 a section entitled gospel and invitation, near the bottom of page 38?

A Yes, there is.

Q Was that something that you followed as part of the presentation of this lesson?

A No, sir.

Q What is the difference between gospel and invitation, and invitation only that we saw in some of the earlier lessons?

A I know of no distinction.

Q Okay. Did you also teach lesson 6 entitled, David spares Saul's life?

A Yes, I did.

Q And what was the theme of lesson 6? [100]

A That we need to treat others well even though they may have mistreated us.

Q And what was the conclusion of this lesson?

A It would be, again, that God can give you the strength to not mistreat those who have done -- done evil to you, he can help you to do good to those who are bad to you, and again, if you would like to receive the Lord Jesus as your Savior in order for you to

accomplish that, you could raise your hand and Mrs. Fournier will speak with you privately.

Q Okay. Now, at page 47 of the materials, there's a song there known as, I have a friend. Was that song sung as part of the Good News meeting?

A No, sir. It's in Spanish.

Q How about at page -- I guess it would be 48.

A I don't have 48.

MR. MARCELLE: I got this at the puzzle page.

MR. MILLER: Yes, at the puzzle page.

Q Is that part of the teaching manual, the [101] puzzle page?

A I believe that comes within the packet of materials that we get along with the teaching manual, whether that itself is part of it, I am not -- I'm not sure.

(A short recess was taken.)

(Defendant's Exhibit H marked for identification.)

Q Showing you what's been marked Exhibit H and ask you whether you recognize this document?

A Yes, I do.

Q What is it?

A These are memory verse tokens.

Q And what is a memory verse token?

A We make copies of these and separate them individually and then pass them out.

Q Okay. Are these used as part of the instruction that you offer in the Good News Club?

A These are given at the end of club for them to take home for them to memorize the passages.

Q Did you actually use these during the meetings of the Good News Club that you participated? [102]

A We did not use these specific ones. These are from the King James version. We used ones from the NIV. They're the same verses, but only a different translation of the Bible.

Q So you use ones very similar to these?

A They would be --

MR. MARCELLE: When you say -- I just -- you mean these are the ones, they actually distribute them to the --

MR. MILLER: In the fashion he described it, I believe he said you distributed them to the students in the class?

THE WITNESS: That's right.

MR. MILLER: That's how I'm saying it.

(Defendant's Exhibit I marked for identification.)

Q Referring your attention to Exhibit I and ask you whether you recognize this?

A Yes.

Q And what is it?

A This was a sheet that I typed up at the [103] request of Tom Marcelle, our lawyer, to share

what the lyrics of the songs that have been sung at the Good News Club were.

Q Okay. And is this the song that you've been singing at each of the meetings at the Good News Club at which you've been present?

A No, sir, this contains more than one song.

Q Okay. Can you point out to me which is the theme song for the Good News Club?

A Theme song is not on here.

Q Oh, it's not.

A I'm sorry.

Q Which are these songs then? Perhaps you can explain the Exhibit I to me.

A These are songs that at some point in time have been sung at the Good News Club. Each paragraph represents an individual song.

MR. MARCELLE: All right.

(Defendant's Exhibit J marked for identification.)

Q Directing your attention to Exhibit J and ask you if you can identify that for me?

A It's what is called the quiet time calendar. [104]

Q And what is the quiet time calendar?

A We, at certain times, not at every club, ask the children if they would like a quiet time calendar, and what they do is they would look up the verse, one verse every day and read that verse, and they would mark it off, and when they turn this back in, we would

give them some sort of prize.

(Defendant's Exhibit K marked for identification.)

Q Showing you what has been marked as Exhibit K and ask you if you can identify that for me?

A It's the verse Acts 1:8.

Q And how was this document used in your meeting?

A I'm not exactly sure how this specific one was used, but we do use this type of format to teach them the memory verse. We would hold this up and we would all recite this verse together.

MR. MARCELLE: I see. Off the record one second.

MR. MILLER: Sure. [105]

(Defendant's Exhibit L marked for identification.)

Q Referring your attention to Exhibit L, can you identify this for me?

A I believe this is lyrics to a song from the material.

Q Okay. It was a song that was sung in the class?

A This particular song, no, it was not.

Q Okay. How about this diagram, was this diagram used --

A This particular one was not displayed.

MR. MARCELLE: Okay.

(Defendant's Exhibit M marked for

identification.)

Q Referring your attention to Exhibit M, can you identify this document for me?

A No, sir, I don't know what this is.

Q Okay. Did you use materials, M, beginning with "Tell Others The Story," like Exhibit -- you indicated you used exhibits like Exhibit K in the presentation?

A Yes, sir, Scripture verses. [106]

Q Okay. Do you recall which Scripture verses you used, would they correspond with the instructional materials?

A Yes, they would.

Q Okay. So did you do that as a regular part of the presentations that you made in the class?

A The Scripture verses that Exhibit K is an example of would be a memory verse that would be displayed.

Q Okay.

A Each week.

Q And did you have one of those kinds of displays like Exhibit K in each of the lessons?

A Yes, we would, with the exception -- with every one, yes.

(Defendant's Exhibit N marked for identification.)

Q Referring your attention now to Exhibit N, can you identify that for me, please?

A This is Daily Bread. It's a devotional booklet.

Q What does the phrase daily bread mean? [107]
A It's the title of the book.
Q Well, does it have any religious significance?
A Other than when I hear the term for me personally, it would be just a -- some sort of devotional material that would be used on a daily basis.
Q The phrase daily bread appears in the Lord's Prayer, doesn't it?
A Yes, it does.
Q And is that the -- from what you understand of Exhibit N, is that the same reference to daily bread as appears in the Lord's Prayer?
A As I understand it?
Q Yes, as you understand it.
A No, sir.
Q Do you have any understanding as to what the phrase daily bread means in reference to Exhibit N?
A I believe I already answered that, and that to me refers to some sort of devotional material that's used on a daily basis.
Q Would it be fair to say that bread is then equated with some sort of spiritual [108] nourishment?
A In this context?
Q Yes, sir.
A I would say so.
Q All right. Now, the word maranaja, do you know the significance or the meaning of that

phrase?
A I believe maranaja means -- it refers to the coming again of the Lord Jesus. I'm guessing. I believe that's what it means. I'm not sure.
Q Referring inside the document to -- inside Exhibit N to what I guess would be possibly page 2 under, what's the password, do you find that?
A Yes, sir.
Q I believe at the end of the second full paragraph there 's a definition for maranaja. Is that consistent with your understanding of the definition of the term maranaja?
A Yes, sir.
Q Okay. Could I refer your attention please to page 3 of the Daily Bread under, solving a [109] mystery, do you find that?
A Yes, sir.
Q Under the second full paragraph, there's a sentence that begins, the Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ.
A Yes, sir.
Q Now, do you -- with respect to Exhibit N, do you teach from Exhibit N, a chapter, for 10 example, on solving a mystery?
A No, sir.
Q Okay. What then is the purpose of the -- or how was the Daily Bread booklet, Exhibit N, used in your classes?

A It is not used in the classes, per se.
Q All right. How is it -- what do you do with it then?
A These normally are given out to the children who have completed the quiet time calendars. It would be Exhibit J. Those who complete that would receive one of these. That's how they're normally used.
Q All right. Is there any teaching from Exhibit [110] N that occurs or reading from Exhibit N that occurs in the class?
A No, we don't read from these.
Q All right. And what is your purpose in distributing copies of the Daily Bread to the students who complete the calendar?
A I guess that they would continue in a daily habit of reading the Bible.
Q Okay. So it is your understanding that contained in this Daily Bread are excerpted portions of the Bible, both New and Old Testament?
A I am assuming that is both new and old. I could not tell you for certain, I've not read through one of these.
Q Okay. Are you certain then at least that it's predominantly New Testament that's in there?
A I would -- just from scanning over what I see here, I would say that would be a correct statement.
Q Okay. And would it also be fair to say that

there are multiple references in the Daily Bread to accepting Jesus Christ as your [111] Savior?
A I would just -- yes, I would assume that to be true.
Q How many students in the current year's class have you distributed copies of the Daily Bread to?
A I cannot recall one. I do not know if that's true, but I do not recall any.
Q Okay. Do you recall giving out any last year?
A Within with the Good News Club? I don't personally recall.
Q Okay.
A I'm not saying it didn't happen, I just don't recall.
Q All right. Now, in the -- in your complaint and also in the paper that you filed in connection with the application for the injunction in this case, you have compared your organization to the Boy Scouts. Would that be a fair or accurate statement?
A Yes, sir.
Q Okay. Do you know of in what way your organization, the Good News Club, is similar [112] to the Boy Scouts?
A Both clubs seek to teach children or youngsters moral values.
Q Okay. What do you base your statement on in regard to the Boy Scouts?
A I'm not sure I understand your question.

Q All right. Do you have any training as a Scout leader?
A No, sir.
Q Were you ever yourself a Boy Scout?
A Yes, sir.
Q Okay. For how long were you a Boy Scout?
A That's a long time ago.
Q Sure.
A A couple years.
Q All right.
A Maybe.
Q Now, does your organization, the Good News Club, have activities similar to the merit badge activity where students perform various activities and receive an award?
A Outside the club?
Q or inside the club. [113]
A I'm not exactly sure. I guess I'm not following you, I guess.
Q All right. Well, in what way does the Boy Scouts teach moral values?
A Well, through the badge system incentives.
Q Anything else?
A What I recall?
Q Do you have any familiarity with whether the Boy Scouts teach Bible verses in any of their meetings?
A I have no -- I could not say.
Q I couldn't hear you.
A I could not say. I'm sorry.
Q Do you know whether the Boy Scouts offer

instruction in matters related to the New or the Old Testament?
A Yes, they do.
Q Okay. In what way does the Boy Scouts do that?
A They have a badge called God and Country which entails them to be active within the church.
Q But is the instruction for the completion of that badge done in the Boy Scout meetings, or [114] is it done outside those meetings while the person attends church or religious activities?
A I'm not sure if it -- a portion of it would be in the meetings or not or -- I know a portion of it is from the outside, within the church.
Q Do you have any firsthand knowledge that the Boy Scouts conduct lessons of a religious nature with the members of the entire troop?
A Firsthand knowledge?
Q Yes, sir.
A No.
Q How about with respect to the Girl Scouts. You have compared yourself and your organization, the Good News Club, to the Girl Scouts. Is that a correct statement?
A Yes, sir.
Q Okay. In what way is your organization similar to the Girl Scouts?
A Again, we both seek to teach morals to

youth.

Q All right. In what way does the Girl Scouts teach morals to youth?

A Again, with the badges and incentives and that type of thing. [115]

Q Okay. Do you have any firsthand knowledge that suggest that the Girl Scouts conducts lessons in Bible or Scripture?

A I have no firsthand knowledge.

Q Okay. Are you aware of what specific instruction the Girl Scouts give in religious subjects?

A No, sir.

Q Now, you have also compared yourselves to the Little League. In what way is your organization similar to the Little League?

A A part of it is teaching kids morals.

Q Are you familiar with the way in which the Little League teaches kids morals?

A Yes, sir.

Q And how is that done?

A I coached.

Q Okay. And how did you teach morals as part of the Little League?

A You teach fair play. You teach -- emphasis is not just on winning. It's, you know, playing fairly, it's, you know, that type of thing.

Q When you were a coach in the Little League, [116] did you conduct instruction in the Bible or Scripture?

A No, sir.

Q When you were a coach in the Little League, did you hold sessions in which you held formal instruction on moral values or moral teaching?

A I'm not sure I understand what you mean by – formally. How do you -- I mean --

Q In the Good News Club you give a lesson, do you not?

A Right, right.

Q Did you do anything like that with the Little League in regard to morals or moral values?

A Sitting down and explaining to them what honesty was or --

Q Correct.

A No.

Q Is there any other way in which you compare yourself to the Little League, your organization to the Little League?

A Other than we're seeking to teach moral values to children, no.

Q Okay. Are there any other groups that you [117] compare yourselves to who also use the school facility?

A Yes, sir.

Q Who other groups do you compare to?

A 4-H.

Q And in what way are you -- is your organization similar to the 4-H Club?

A Teaching moral values to young children.

Q How does the 4-H Club do that?

A They do it through different projects, for

example, my daughter raised chickens through the 4-H. It's to teach responsibility, that type of thing.

Q Okay. In the 4-H Club, is there any formal instruction in morals or in responsibility?

A I have no firsthand knowledge of that.

Q Okay. Does the 4-H Club teach Scripture or Bible verses as part of its acuvity?

A I have no firsthand knowledge of that.

Q Does your organization compare itself to any other organizations that use the school facility as regulated?

A Not that I recall. [118]

Q Okay.

MR. MILLER: Just give me a moment to check over my notes. I think I'm almost done.

Q Let me ask you, did there come a time that you showed some movies in some of your classes of the Good News Club?

A Yes, sir.

Q All right. Do you recall what any of those movies were?

A They were -- a couple of the general movies, title is Veggie Tales.

Q What are those movies about?

A They're computer-generated characters. They're vegetables, and there's Bob, the tomato, Larry, the cucumber, and the movies basically teach some sort of moral value. For instance, there's one -- I don't know if we

showed this one, but they're all basically like this, Larry and the Giant Fib. And it's a story about lying and how lying can just get out of hand. And they basically, again, just teach a moral lesson. I believe we showed one [119] that dealt with the story of David and Goliath, of course it was vegetables fighting rather than people. And I can't recall the other one that we -- that we showed.

Q Was there a movie entitled, Where is God When I'm Scared?

A Yes, that is a Veggie Tale movie.

Q And was that the point of that movie, teaching children about believing in God and God taking care of them when they're scared?

A It was that we don't have to be afraid, you know, of the boogieman or anything else because God is watching over us, that he is above us.

Q Okay. In viewing these movies, did you have occasion to observe whether these movies mentioned Jesus Christ?

A They do not. There was -- there's a whole series of them, and I believe there's only one in the whole series that mentions Jesus Christ.

Q Okay. Which one is that?

A That would be one on Christmas. [120]

Q Did you show that movie at or near

Christmas time this year?
A I don't believe so, no.
Q Okay. How about in the prior year?
A We have not shown that movie.
MR. MILLER: Okay. I think for the time being I think I'm all set. Thanks very much. Thanks for your patience.
(Pause in the proceedings.)
DARLEEN FOURNIER, having been first duly sworn by the Notary Public, was examined and testified as follows:
EXAMINATION BY MR. MILLER:
Q Mrs. Fournier, my name is Frank Miller. I'm going to ask you some questions. If at any time you don't understand my questions, please let me know and I'll be happy to rephrase the question. Can we agree upon that?
A Yes.
Q All right. Would you state your full name for the record, please?
A My name is Darleen Fournier.
Q And how old are you? [121]
A I'm 36.
Q Okay. May I have your date of birth, please?
A June 29th, 1961.
Q And where were you born and raised?
A I was born in Limestone, Maine, and I was raised in Montville, Connecticut.
Q What's your educational background?
A I graduated from Montville High School in

1979, and I graduated from Westbrook College in Portland, Maine, in 1981 with an associate's in applied science.
Q Any other education beyond that?
A I took a community course on computer programming.
Q Now, in regard to the matters involving this litigation and the claim against the Milford Central School District, what was your first involvement with the Milford Central School District regarding the request to use their facilities for meetings of the Good News Club?
A My first involvement was sending in a use of school form.
Q Prior to that time, had you had any [122] discussions with any school officials concerning the use of the building?
A No.
Q Okay. The building use request form was submitted in 1996, as I understand it, and did there come a point in time prior to that that you ran meetings of the Good News Club at a local church?
A Yes.
Q Okay. For how long did you run meetings of the Good News Club in the church?
A One and a half years.
Q And am I correct in understanding that prior to September of 1996 students who wished to participate in the Good News Club were

allowed to ride the buses from the Milford Central School District to the Milford church where you and your husband would conduct the class?

A I can't answer that question because my husband didn't run the class. So that's an inaccurate statement.

Q All right. Well, in the year and a half or so that you ran the class at your church in [123] Milford, were the students bused from the Milford Central School District to the church?

A Yes.

Q Okay. Did there come a point in time in which you discussed some things with school officials concerning an alteration in the transportation schedule that would mean the district would not be able to transport your students anymore?

A Was there a discussion between myself and someone?

Q Did there come a point in time when someone from the school district told you they wouldn't be able to transport the students from the school to the church at some time prior to September 22, 1996?

A No.

Q Okay. How did you learn that the school district was not going to be transporting the students from the school to the church for purposes of the Good News Club meetings?

A That came from some of the children themselves stating that. [124]

Q Okay. Approximately when did you first learn of this?

A I believe that would have been September, October of 1996.

Q Okay. When you became aware that the school was not going to transport the students from the school to the church for the Good News Club meetings, did you talk with anyone at the school district about that?

A No.

Q Okay. Did you make any inquiries to find out why that change had occurred?

A No.

Q Did you do anything to try to get the transportation back to the way it had been before?

A No.

Q Prior to submitting your request to use the facilities did you talk with any school officials about the availability of rooms within the school district for purposes of conducting the Good News Club meetings?

A Before I sent in the form? [125]

Q Yes.

A No.

Q I'm showing you what's been marked as Exhibit A and ask you if you can identify that for me, please?

A It's the use of facilities request form.
Q And is that form completed in your handwriting?
A Yes.
Q Okay. Was it you that completed it?
A Yes.
Q Okay. Was it submitted to the school district at or about the date that appears on that, namely September 22, 1996?
A I don't see a date.
Q I think near the top, about a quarter of the way down you'll see a date.
A Yes.
Q Okay. Does that date reflect when you completed the form?
A Yes.
Q Okay. And would that date also reflect when you submitted it to the school officials? [126]
A There could be a day difference.
Q Okay. Can you describe for me the process that you went through with respect to Exhibit A? Did you secure the form first and complete it at home and then bring it in?
A I had the form at home, I completed it, I sent it in with my daughter.
Q Okay. All right. Which daughter?
A I believe that would be Brooke.
Q Okay. And what -- what happened after that?
A The day that the form was brought to school,

I got a phone call from Dr. McGruder, and he said that he would not -- the school would not be able to accommodate our request.
Q All right. Was this a communication by phone?
A Yes.
Q Okay. And did he call you at home?
A Yes.
Q All right. Can you describe for me, did he say anything other than the district wasn't able to accommodate the request?
A Yes.
Q What else did he say? [127]
A I believe he mentioned that in another district, he had a request from a priest and that he denied that priest the use of the school and because he had said no then, he was saying no now, and that because of separation of church and state, our club could not use the school.
Q All right. Did he ask you any questions about what the Good News Club was or how it operated?
A No, sir, and he was not interested.
Q Okay. When you say he was not interested, how do you know that?
A I could -- I could tell that his no was no, and that was it.
Q All right. But did you discuss with him at any time in the conversation what would occur in the meetings of the Good News

Club?

A No, and I didn't feel that I had to because it was right on the form. He knew full well what we were going to be doing in the meetings.

Q Okay. So you felt that what was on the form was an accurate and complete description of [128] the activities?

A Yes.

Q Okay. Now, did there -- how long did this conversation last between you and Dr. McGruder?

A Probably more than ten minutes.

Q Do you recall anything else that was discussed in your conversation with Dr. McGruder?

A I do remember speaking to him about wanting to get together with him and the board, whether it was at my first conversation or whether it was a subsequent conversation, I don't remember.

Q What, if any, response do you recall Dr. McGruder making?

A He didn't seem to think that that was necessary. He had said no.

Q All right. Was anything else discussed in this initial conversation between you and Dr. McGruder?

A I don't recall.

Q Okay. After you completed your phone call from Dr. McGruder, what, if anything,

occurred [129] next in relationship to your request to use the facility?

A The only thing that I've done is to fill out and send in the forms. I've answered the phone when Jim Haverner and Dr. McGruder have called.

Q All right. After you talked with Dr. McGruder, did you speak with him again at some point later about the building use request? Is that what you're --

A It may have only been that one conversation.

Q Okay. All right. And then you're indicating you had yet another subsequent conversation with Jim Haverner?

A I do recall speaking with him on the phone.

Q Okay. And approximately when did you have that conversation with Mr. Haverner?

A It was after September 22 and -- and it was in the fall.

Q All right. Was the conversation in reference to your request for building use?

A Yes.

Q Okay. What, if anything, did Mr. Haverner say [130] to you at that time?

A He implied that he had no problem with teachings that we might have, but if they allowed us to use the school, that there might be other people who would want to use the school, and that he wouldn't want their message being taught at the school.

Q Okay. When you say, you said he had no

problem with what you were teaching, what was he referring to?

A Well, the only knowledge that he could have concerning our Good News Club was what was on the request form, and it says that we were with a group of boys and girls meeting an hour a week for a fun time of singing songs, hearing a Bible lesson and memorizing Scripture. So that must be what he did not oppose.

Q He didn't say -- he didn't embellish his answer or his statement to you in any way?

A Right, correct.

Q At the time that you had this conversation with Mr. Haverner, was he a member of the [131] Board of Education?

A Yes.

Q Was he the board president?

A Yes.

Q Did he identify himself as such when he contacted you?

A I understood him to be calling on official business, yes.

Q Okay. All right. Now, did he discuss anything else with you in the conversation?

A I believe he did speak about having the children leave the school and walking a distance and using a building and paying a fee that would go to an organization that he was involved in.

Q Did he identify for you what the facility was

that he was suggesting you to use?

A Yes. I believe that would be the historical society building, and I believe that's called the Zayre House.

Q Did you make any response to what he said to you?

A Yes. I told him that would be unacceptable. [132]

Q Okay. And why was that unacceptable to you?

A Because to me, it reminded me of being in the 60s when black children were told that they could use a different black bathroom and they could sit in a different place on the bus, and that because of our message, being from a Christian perspective, that we were not welcome here.

Q Did you say that to Mr. Haverner, what you just told me?

A I told him that it would not be acceptable for the children to have to leave the school and go someplace else.

Q And did you explain to him anything else about your reaction to his proposal? Did you tell him anything else?

A I told him that I was concerned for the safety of the children because they would have to walk a distance unsupervised.

Q Anything else?

A I may have told him that it was logical for the children just to remain at school because

that made it easier for the parents. [133]

Q Did you and Mr. Haverner discuss anything else in the conversation?

A I don't recall anything else.

Q Okay. After you spoke with Mr. Haverner, what happened next in regard to your application for the use of the building?

A Like I said, I've sent in the use of facility request forms. I've spoken with Dr. McGruder concerning some mimes coming to perform at the school, and I have spoken with Peter in his office.

Q What other conversations did you have with Dr. McGruder?

A Except to answer the phone if he called and hand it over to Steve, that would be it as far as I recall.

Q Okay. What was the discussion you had with Dr. McGruder concerning mimes performing at the school?

A We wanted to bring in the -- a couple who perform as mimes and have them come and perform for the Good News Club. And Dr. McGruder was adamant that he did not want [134] those mimes at the school.

Q Did he tell you why?

A The same reason that he didn't want the Good News Club at the school, he didn't want these morals and values to be taught at the school after school from a Christian perspective.

Q Did he tell you what he found objectionable about the mimes' proposed performance?

A No.

Q Were the mimes persons who would present a -- an act with a religious theme?

A The mimes would perform a skit, the skit would portray some moral or value from a Christian perspective.

Q Did you submit a separate building use request form for the mimes?

A Yes.

Q All right. When did you submit that?

A I believe we wanted to have them at our end of the school year party, so that would have been in all probability, June.

Q June of '97?

A Yes. [135]

Q Okay. Now, when you say that the mimes were to present a moral from a Christian perspective, what -- what does that mean?

A Christian perspective is that you need the Lord Jesus to help you to be able to give you the power actually to live a moral life.

Q What was it that the mimes would do that would be of a religious nature, if anything?

A I don't know that I would call it a religious nature. There weren't any traditions -- church traditions taught, basically it was just a songs -- children's songs that were acted out through mimes.

Q Were any of those songs of a religious

nature?

A There were no church teachings, there were no church traditions, just general morals, values and Bible teachings.

Q Did the mimes' skit involve Bible teaching?

A Yes.

Q And did Dr. McGruder make Some reference to -- to the fact that the mimes would be teaching a Bible lesson as a reason for his turning down your request? [136]

A No, he just had a really sore spot concerning those mimes.

Q Okay. Did he articulate or tell you why it was that he had a sore spot?

A No.

Q What do you understand from his conversation was the reason why he, as you put it, had a sore spot about the mimes?

A He never elaborated on that.

Q How do you know that he had a sore spot about it?

A Just from things that people have said.

Q When you say things that people have said, are you referring now to people other than Dr. McGruder?

A Yes.

Q Okay. So I take it that these would have been conversations that you had sometime after you had spoken with McGruder about the mimes?

A No.

Q Well, when did you talk with these people?

A I knew that Dr. McGruder had a problem with these mimes before I sent in the form. [137]

Q How did you know that he had a problem with the mimes?

A From what other people have said.

Q Okay. Specifically who?

A Someone that worked in the school.

Q Okay. Who was it that you're referring to?

A Martha Chapman.

Q Martha Chapman?

A Um-hum.

Q What position does Martha Chapman hold?

A I believe she's the treasurer's assistant.

Q Did she tell you what it was that Dr. McGruder objected to about the mimes that you were proposing to come in and do a skit?

A No.

Q What, if anything, did Martha Chapman tell you about Dr. McGruder's attitude or opinion on the subject of the mimes?

A She said that there was -- he said that there was no way that those mimes would ever be in that school again.

Q Had the mimes performed in the school before?

A Yes. [138]

Q And do you know what it was that the mimes did when they performed at the school?

A I did not see them, but I know that they had

music and performed skits along with other performers that day.

Q What kind of music did they have?

A I didn't hear the music.

Q Okay. Do you know what kind of music they were supposed to be utilizing at the -- on the occasion when you had proposed them to come and make a presentation?

A Yes.

Q Okay. Well, what kind of music was it?

A Children's songs.

Q Were any of them of a religious nature?

A Again, they don't depict any religion. They simply are children's songs that may contain Bible verses, morals, values.

Q So Dr. McGruder, I take it then, never mentioned to you why it was that he objected to the mimes coming into the school building?

A Correct.

Q And if I understood your earlier testimony, it [139] is to the effect that you never spoke with McGruder at any time about his reasoning for denying your request for the mimes, is that also correct?

A Correct.

Q Did you have any further conversations with Dr. McGruder?

A Not that I recall.

Q Did you have any additional conversations with Mr. Haverner?

A Not that I recall.

Q Did you have any conversations with any other school officials about your request for building access?

A Is a teacher a school official?

Q It certainly could be within the parameters of my question. I'm using that very broadly, so if you had a conversation with a teacher about it, I'd like you to tell me.

A Yes.

Q Okay. Who did you speak with?

A I spoke with Mr. Hasley.

Q And he is the' teacher at the school district? [140]

A Yes.

Q Okay. And what was your conversation with Mr. Hasley?

A I just gave him the general rundown of what we've been going through and where we were at that point.

Q And what, if anything, did Mr. Hasley say to you?

A I don't recall what he said.

Q Other than Mr. Hasley, did you have any other conversations with any other school officials?

A I don't know if Martha Chapman is a school official or not. I know she works at the school.

Q You've already told me about speaking with her about the mimes. Is there anything else

you spoke with her about?
A As far as I recall, just general information.
Q Was there anything specific as to this case that you discussed with Martha Chapman?
A Basically just what was published in the newspaper.
Q Okay. Do you have a specific recollection of [141] when you spoke with Martha Chapman?
A No.
Q How many times did you speak with Martha Chapman?
A About this issue?
Q Yes, ma'am.
A I wouldn't be able to tell you.
Q All right. Did you speak with any other school officials concerning this situation of your request to use the school facility?
A No.
Q Did you say no?
A No.
Q Now, did there come a time that you conducted the classes of the Good News Club when the classes were actually held at the school facility?
A I'm sorry, did you ask if I taught the lessons?
Q Yes.
A Yes.
Q Okay. How many of the lessons did you teach?
A Four, I believe. [142]

Q Okay. Would those be four lessons out of the materials that we identified earlier as the materials from the Child Evangelism organization?
A They were all four from the Child Evangelism organization.
Q Okay. And are those the same lesson plans or lesson book that was identified earlier as the book entitled David, a man with a good heart -- or a man after God's heart? I'm sorry. Excuse me.
A Yes, there were three lessons from David that I had taught.
Q Okay. And was there another lesson from some other source that you had taught?
A Still CEF.
Q Okay. What materials are you referring to now as having taught out of that were not from the David book?
A There was a Christmas story.
Q Okay. And what materials are you referring to about the Christmas story?
A The lesson has a name, but I don't know what [143] it is.
MR. MILLER: Do we have that in these exhibits?
MR. MARCELLE: I don't think so.
MR. MILLER: Could I then request a copy of the Christmas materials lesson?
MR. MARCELLE: Absolutely.
MR. MARCELLE: Again, I think this is

mostly before Christmas. I don't recall in my review seeing the Christmas story. I'm pretty sure it is in there, Frank.

Q When did you teach the Christmas lesson, was it for Christmas of '97 or Christmas of '96?

A Christmas of '97.

Q Okay. And earlier I asked your husband some questions about the -- the general description or outline of how the club meetings were run. Can you describe for me in general how the club meetings were run, what were the events that you did?

A The children arrive and if they'd like to share a memory verse that they had learned the week before with me, they may, and if they [144] recite it, they get to write their name on the board. And then there's an opening prayer, and a song, and then we have a memory verse from the Bible that I help the children to learn. I use a game to help them to learn it. There's a Bible story to portray a moral or a value lesson, a review game. If there's time there's a missionary segment. And -

Q Missionary what?

A Segment. And then we will draw for quiet seat prize. We'll recognize that if somebody has a birthday, give them a pencil, sing happy birthday, give out candy for everyone-- everyone who comes gets a piece of candy.

Those who have said their verses get another piece of candy. And sometimes there's an additional song if we have time. And then that's it.

Q Are the lessons held on Tuesday afternoons?

A Yes.

Q And the time goes from 3 to 4?

A Yes.

Q Now, who leads the children in prayer at the [145] beginning of the meeting?

A My husband.

Q And has that been true even during the period of time when you were teaching the class?

A I believe so.

Q Now, earlier --

MR. MARCELLE: Frank, just interrupt you. Mind if I just have one minute?

MR. MILLER: Sure, take what you need.

(A short recess was taken.)

Q Now, in the lessons that you've taught, did you also at the conclusion of the lesson go through the process of the challenge and the invitation?

A Yes.

Q Okay. Can you describe for me what you understand the challenge to be and what the invitation is?

A The challenge is for the children to take the moral lesson that was taught and to apply it to their lives. And the invitation, it gives the

children an opportunity to seek God's [146] strength through a personal relationship with Jesus Christ to be able to do the same thing.

Q Okay. And for all of the lessons that you taught, the four lessons that you taught, was the challenge and invitation a part of the lesson?

A Yes.

Q Okay. Now, did you have any conversations with Mr. Livshin about the use of the building by the Good News Club?

A Yes.

Q Would you describe for me, please, each of your conversations with Mr. Livshin?

A I recall Steve and I going to the school and meeting with Peter and asking him if everything was all set for our use of the school, and he very kindly showed us the room that we would be able to use and wanted to make sure that it was all right. And he also asked whether or not we had any insurance. And at that time, we said that we thought we did. He said we needed it, a certificate.

Q Do you recall when that conversation took [147] place?

A I believe that would have been in September of '97.

Q And have you had any conversations with him since then about the use of the room by

the Good News Club?

A No, not about the use of the room.

Q Okay. Have the conversations that you've had with Mr. Livshin in any way had any relationship to the lawsuit that you filed against the Milford Central School District?

A Only in a very general sense.

Q Okay. To the extent you've had any conversations him about the lawsuit in any regard, I would like you to tell me about those conversations. I'm not interested in conversations about things unrelated to the lawsuit. So if there's any conversation that you've had about the lawsuit, even in a general manner with Mr. Livshin, I would like you to tell me about it.

A He only made a very general statement saying that this would all be done with one way or [148] another, and that he would just accommodate us because we had a court injunction.

Q Any other conversation about the --

A About the court?

Q -- about the lawsuit or any of the claims that you've raised in the lawsuit?

A No.

Q Now, in the lawsuit itself, it is alleged that you and that the members of the Good News Club have sustained some harm or some injury as a result of the action taken by the school district. Can you tell me what, if any,

harm or injury has occurred as a result of the school district denying your use of the facility?

A Well, it's caused us stress.

Q Okay. Anything else?

MR. MARCELLE: Just, Frank, so I can be clear, are you talking about legal harm or just harm in fact?

MR. MILLER: I really want harm in fact. Obviously I'm assuming you'll take care of the -- [149]

MR. MARCELLE: Right.

MR. MILLER: -- the legal matter. I want to know, you know, if she sustained –

MR. MARCELLE: -- any damages –

MR. MILLER: -- damages, out of pocket expenses, anything like that.

A Is that what you're asking?

Q Yes.

A Monetary?

Q Monetary, personal, anything like that. The term is fairly broad, but it's intended to be.

A Well, it's caused us some difficulty and stresses.

MR. MARCELLE: Also let me state just for the record, I don't think -- we're not making a claim for any damages and we have no intention of doing so, outside of our 1988 remedy if we should -- but I just wanted to put that on the record as well so you know that was our position.

MR. MILLER: All right. Very fine.

Q Now I'm showing you what has been marked as [150] Defendant's Exhibit D. Is that a copy of a letter which you had prepared and forwarded to Dr. McGruder?

A Yes.

Q What was the circumstance that led to your sending that letter to Dr. McGruder?

A It was recommended that this letter -- that a letter be written.

Q Okay, was that by your counsel?

A Yes.

MR. MILLER: Just speak to you outside for a second. I think I'm just about finished.

(Pause in the proceedings.)

MR. MILLER: Tom, we're all set.

Thank you very much.

(Whereupon the proceedings concluded at 2:15 p.m.) [151]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE GOOD NEWS CLUB, ANDREA FOURNIER & DARLEEN FOURNIER

Plaintiffs,

v.

MILFORD CENTRAL SCHOOL,

Defendants.

REPLY AFFIDAVIT

Civil Action No.:
97-CV-0302
(TJM/GLS)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

I, Frank W. Miller, being duly sworn depose and say:

1. I am an attorney at law duly licensed to practice law in the State of New York, and a member in the law firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for Defendant herein.

2. I am duly admitted to practice in the United States District Court for the Northern

District of New York. My bar roll number is 102203.

3. I make this Affidavit in support the Defendant's motion for summary judgment and in opposition to the Plaintiffs' cross motion filed herein.

4. My attention is directed in particular to the affidavit of Steven Fournier submitted in opposition to our motion for summary judgment and in support of his motion for summary judgment. I respectfully submit that Reverend Fournier has ignored the bulk of his testimony and the bulk of those facts which make this activity a form of religious instruction.

5. I wish to reiterate that the passages in particular cited at paragraph "31" of my previous affidavit sworn to July 2, 1998, makes it very clear that Reverend Fournier was involved in religious instruction when he conducted the Good News Club meetings. In particular, Reverend Fournier's explanation of teaching children of morals from a Christian perspective reveals his true purpose in these instructions. The Reverend testified as follows:

> Because we are teaching morals from a Christian perspective, we would present that perspective, which is that

these morals or these values are senseless without Christ. That's to the children who know Christ as a Savior, we say, you know you cannot be jealous because you know you have the strength of God. To children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who somehow hurt you. (See Exhibit 9, Deposition of Reverend Steven Fournier at page 34).

6. The Reverent Fournier also testified as stated in paragraph "31" of my previous affidavit.

7. Reverend Fournier also states in his affidavit in opposition that the meetings of the Good News Club are not religious instruction. He alleges that children are not taught about church traditions and are not taught about the sacraments or other imperatives of the church. However, Reverend Fournier testified at page 23 of his deposition that each of the meetings began with an opening prayer. Other prayers are said during the course of the meeting. Reverend Fournier testified as follows:

There may have been a prayer at some

point for missionaries that are supported by CEF or -- excuse me. I should say that our CEF missionaries.

Question: Any other types of prayers said by the Club?

Answer: There may be at times prayers said to receive Jesus as their personal Savior. (See Defendant's Motion Exhibit "9", page 23)

8. Reverend Fournier also alleges that the Good News Club is not affiliated with any particular church. This completely ignores the fact that the Good News Club is a part of and closely affiliated with the Children Evangelism Fellowship Organization. Further, as Reverend Fournier testified at page 23, the Children Evangelism Fellowship Organization sponsors Christian missionaries throughout the country and throughout the world and Reverend Fournier acknowledges that the Children Evangelism Fellowship Organization is a Christian group. (See Exhibit "9," pages 23-24).

9. Reverend Fournier acknowledged that the phrase "Good News" refers to the Scripture in the New Testament that Christ died for our sins and rose on the third day. (See Deposition of Reverend Fournier. Defendant's Exhibit "9," pages 24-25).

10. Reverend Fournier testified that children are asked to memorize certain Bible verses. They sing songs of a religious nature. Religious material is distributed during the course of the meeting and games of a religious nature are played, movies with a religious theme are presented, even prizes of a religious nature are awarded to the children.

11. Although Reverend Fournier alleges in his affidavit that other children are permitted to attend these meetings, he acknowledges at page 27 of his deposition, Exhibit 9, that he is unaware of any person of either the Muslim or Jewish faith who attends these meetings. It appears from the deposition testimony of Reverend Fournier that the children who attend these meetings are all members of one Christian religious denomination or another.

12. Reverend Fournier also acknowledged that there are times during the Club meetings when asking children to accept Jesus Christ as their Savior is part of the lesson and part of the instruction. Page 32 of Reverend Fournier's testimony he testified as follows:

> Question: Are there occasions during the Club meetings when accepting Jesus Christ as their Savior is part of the lesson or part of the instruction?

> Answer: Yes
>
> Question: Can you explain to me under what circumstance that occurs?
>
> Answer: That occurs during the story at some point.
>
> (See Defendant's Motion Exhibit "9," page 32).

13. Reverend Fournier testified at page 34-35 that songs invoking the names of Jesus Christ are routinely sung as a part of the regular program in the Good News Club.

14. Reverend Fournier testified that the games which the children play are replete with religious references. (See Deposition of Reverend Fournier, Deposition Exhibit "9," pages 35-36).

15. Reverend Fournier also testified that missionary stories are told as well in which the purpose of the story is to offer an explanation of spreading the Gospel. (See Deposition of Reverend Fournier, Deposition Exhibit "9," pages 37-38).

16. Contrary to the assertions of Reverend Fournier in his most recent affidavit, the Reverend testified that the Good News Club is a religious organization. The Reverend testified as follows:

Question: Alright. Do you disagree with the idea that the Good News Club is a club that is of a religious nature?

Answer: See, it depends on how you define religion. And people define it in different ways and in different contexts, and also even I will define it differently, depending on who I'm speaking to.

Question: Well, insofar as what you know of the Club using your definitions, is it your conclusion that this is a club that engages in activities of a religious nature?

Answer: I would say yes, in a religious nature that religion is, you know, just an acceptance of a set of standards of a set of beliefs.

Question: Of course. And when you indicated that it was teaching moral values from a Christian perspective, are those moral values in your judgment meaningful if the person being taught those values does not accept the tenants of Christian belief?

Answer: What makes them

meaningful, in my opinion, is a Christian perspective, if the fact that you need a relationship with Christ to fulfill them the way God would have you fulfill them.

Questions: Does the Club, insofar as you instruct it, is the Club instructed in what you just described and that is that the moral values are only meaningful with a relationship with Christ?

Answer: I don't think I said that they're only meaningful. I said that they were only meaningful to God. They're only meaningful in that they're His standards.

Question: Okay. Do you teach that as part of what you teach in the Good News Club meetings?

Answer: That's the Christian perspective, yes.

(See Deposition of Reverend Fournier. Deposition Exhibit "9," pages 68-70).

17. Reverend Fournier testified to the very deeply religious nature of these meetings. He

testified to their religious nature at page 89-90 of his deposition.

18. Upon information and belief, it is therefore clear that the focus of the Club is to promote the Christian faith. Upon information and belief, central to every aspect of the Club's activities is a belief in God and, in particular, a belief in Jesus Christ.

19. Upon information and belief, the argument that the instruction does not accentuate instruction in any particular religious sect, i.e., Protestant, Catholic, etc., misses the point. The instruction during meetings still focuses on a belief in God and, in particular, general beliefs in the Christian faith. The fact that the beliefs of a particular Christian religion are not promoted is irrelevant.

20. We respectfully submit that the activities of the Good News Club are decidedly of a religious nature and that the Milford Central School District acted appropriately when it refused to permit the Good News Club to use the school facilities as it violated the school's policy concerning its limited forum.

/s/
Frank W. Miller

Sworn to before me this
31st day of July, 1998.

_____
Notary Public

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Supreme Court, U.S.
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NO. 99-2036

IN THE
SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF ON THE MERITS FOR PETITIONERS

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November 30, 2000

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QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution?

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to this proceeding.

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BRIEF ON THE MERITS FOR PETITIONERS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners The Good News Club, Andrea Fournier, and Darleen Fournier respectfully submit their Brief on the Merits to this Honorable Court. Petitioners seek reversal of the decision of the United States Court of Appeals for the Second Circuit in *Good News Club v. Milford Central School*, 202 F.3d 502 (2000), that Respondent may, without violating the First Amendment, open its facilities to the public for "the purpose of instruction in any branch of education, learning or the arts," but exclude members of the public who wish to engage in instruction "for religious purposes."

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *The Good News Club v. Milford Central School*, is reported at 202 F.3d 502 (2nd Cir. 2000) and appears in Appendix A of the Petition for Writ of Certiorari. The opinion of the United States District Court for the Northern District of New York is reported at 21 F. Supp. 2d 147 (N.D.N.Y. 1998) and appears in Appendix C of the Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1). Jurisdiction was had in the first instance pursuant to 28 U.S.C. §1331, insofar as Petitioners filed suit in the United States District Court for the Northern District of New York on March 7, 1997, alleging causes of action under 42 U.S.C. §1983. The District Court entered judgment against Petitioners on all claims on

October 23, 1998. Pet. Appx. at C1, C32-33. Petitioners filed timely Notice of Appeal to the Second Circuit Court of Appeals on October 30, 1998 pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. Joint Appendix ("J.A.") at B10 (Notice of Appeal docketed). The Second Circuit Court of Appeals filed its Judgment affirming the District Court on February 3, 2000. J.A. at A4. Petitioners' Petition for Rehearing was denied by Order dated March 21, 2000. J.A. at A4, Pet. Appx. B1. Petitioners timely filed their Petition for Writ of Certiorari on June 16, 2000, and certiorari was granted on October 10, 2000. The time for filing Petitioners' Brief on the Merits and Appendices was extended by this Court to November 30, 2000.

RELEVANT STATUTES AND REGULATIONS

UNITED STATES CONST. AMEND. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ....

NEW YORK EDUCATION LAW § 414 (2000):

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all

portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; ....

* * * *

(a) For the purpose of instruction in any branch of education, learning or the arts.

* * * *

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community, but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

Milford Community Use of School Facilities Policy:

The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:

For the purpose of instruction in any branch of education, learning or the arts.

[Paragraph 2 is omitted]

> For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public.
>
> [Paragraphs 4-7 are omitted]
>
> **Use for Nonreligious Purpose:** School premises shall not be used by any individual or organization for religious purposes.

Pet. Appx. D1-D3.

STATEMENT OF THE CASE

1. Milford's Community Use Policy.

Milford Central School ("Milford") is a public school district in a small upstate New York community, consisting of a single school building that houses all grades K-12. Milford has opened its facilities for after school hours use by private speakers after the close of the instructional day for a host of purposes, but has prohibited use to those speakers with "religious purposes." There is no dispute that Petitioners, The Good News Club, Darleen Fournier, its leader, and Andrea Fournier, a member of the club (collectively "the Club") are otherwise eligible users of Milford's school facilities, and that youth clubs may use school facilities after school hours for expressive activities. However, Milford denied Petitioners equal access to the after-hours use of its facilities solely because the Club had a religious purpose.

The question squarely presented herein is whether Milford may selectively bar the Club from access because the Club wanted to use the facilities for religious purposes, without violating the Free Speech Clause of the First Amendment.

Milford has adopted a formal policy that governs use of its facilities by community groups when not in use for school purposes. There are two sweeping provisions that are relevant to this case. The policy's first provision opens the school to community speakers on a broad spectrum of subjects. Speakers may use the school for "the purpose of instruction in any branch of education, learning or the arts." Pet. Appx. at D1. According to Milford's Superintendent, this provision would permit, for example, community groups to teach children moral values from literature like Aesop's Fables, J.A. at N11 (Plaintiffs' Ex. 10, Deposition Testimony of Superintendent Livshin), to teach that the world was created by God as literally described in the book of Genesis, J.A. at N11 (Livshin Testimony), and to teach the Bible as literature or history. J.A. at N18 (Livshin Testimony).

Milford's policy also opens its facilities for "social and civic meetings, entertainment events, and other uses pertaining to the welfare of the community." This includes after-hours use of its facilities by youth organizations to "promote the moral and character development of children." See Milford's Brief before the Second Circuit at p. 9. For example, The Boy Scouts use school facilities "to influence a boy's character development and spiritual growth." Lodging at Y1, ¶4, Y3 (Plaintiffs' Ex. 4, Affidavit of Randal Lamb). The Girl Scouts use school facilities "to inspire girls with the highest ideals of character, conduct, patriotism, and service...." Lodging at

Z1, ¶7, Z2 (Plaintiffs' Ex.5, Affidavit of Paula Kiser). The 4-H club uses the school for the purpose of "enabling youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." Lodging at AA1, ¶18, AA5 (Plaintiffs' Ex.6, Affidavit of Darleen Fournier).

Although Milford's community use policy appears to have thrown open the schoolhouse doors for after hours use by any speaker for virtually all topics relating to "learning" and the "welfare of the community," Milford imposes one barrier to entry – a speaker may not have a religious purpose. Milford's policy provides that "School premises shall not be used by any individual or organization for religious purposes." Pet. Appx. at D2.

2. Milford's Denial of Access to Petitioners.

On September 22, 1996, the Club requested use of the school cafeteria for the Club's after-school meetings. Lodging at AA1-AA2, ¶12 (Plaintiffs' Ex. 6, D. Fournier Affidavit). The request form described the Club as "a group of boys and girls meeting one hour a week for a fun time of singing songs, hearing a Bible lesson, and memorizing Scripture." Lodging W1 (Plaintiffs' Exhibit 2, Use of Facilities Request Form). That same day, Dr. Robert McGruder, then superintendent of Milford, informed Petitioners that they could not use the school facilities. Lodging at AA3, ¶13 (Plaintiffs' Ex. 6, D. Fournier Affidavit). Petitioners tried to arrange a meeting with Dr. McGruder to discuss the situation, but were rebuffed. Pet. Appx. at H2, ¶17 (S.D. Fournier Affidavit).

Milford offered evolving reasons for excluding the Club from school facilities. Initially, in September, Milford notified Petitioners

that under school policy "religious groups could not use the school building." Lodging at AA3, ¶13 (Plaintiffs' Ex. 6, D. Fournier Affidavit) On October 3, 1996, Milford told Petitioners that it considered "[the Club's] proposed use to be the equivalent of religious worship, which is prohibited under our District Policy." J.A. at H1-H2 (Defendant's Ex. 2, Letter from R. McGruder to Rev. S.D. Fournier dated October 3, 1996). On March 3, 1997, Milford sent another letter to Petitioners informing them that the Club was being denied use of the school "for the purpose of conducting religious instruction and Bible study." Lodging V1 (Defendant's Ex. 2, Letter from R. Magruder to Rev. S.D. Fournier dated March 3, 1997). Finally, the Milford Superintendent testified in deposition that the Club would not be allowed use of the facilities because it was not using the Bible from a "historical" perspective, but was using it "to promote the Gospel." J.A. at N18 (Plaintiffs' Ex. 10, Livshin Deposition).

3. The Purpose and Organization of the Club.

The Good News Club is a private Christian youth organization that develops children's moral values by using Bible stories, games, scripture, and songs in a fun setting. Pet. Appx. at H1, ¶5 (S.D. Fournier Affidavit). The Club adopts a viewpoint that a relationship with God is necessary to have the spiritual strength to live out moral values. The Club has approximately 25 members (ages 6–12) and is led by Petitioner Darleen Fournier and her husband Steve. The Fourniers are neither affiliated with nor employed by Milford. J.A. at L2, ¶¶9-10 (D. Fournier Affidavit). Written parental permission is required for a child to attend. Lodging X2 (Plaintiffs' Ex. 3, Parental Permission Form). Parents are welcome to attend Club meetings. Lodging X1 (Plaintiffs' Ex. 3, Invitation).

Club meetings center on a Bible story that teaches children a moral value. The Bible stories are not taken verbatim from the scriptures.[1] The Club teaches such moral values as resisting jealousy and obedience to parents.

A brief prayer of thanks opens a typical Club meeting. Next a song is sung that references God. The children then play games designed to teach them a Bible verse that focuses on the moral value being taught that week. After the games, the children are told a Bible story that reflects a moral value. After the value is presented, the children are then challenged and invited to gain the spiritual strength necessary to live out moral values by establishing a relationship with Christ. J.A. at P18-P30 (S.D. Fournier Test.); P109 (D. Fournier Test.).

Children are invited to see Ms. Fournier privately if they would like a time of individual discussion and prayer about establishing a relationship with God. J.A. at P70-71 (D. Fournier Test.). Club meetings end with a game that involves giving the children treats.

---

[1] Sample instructional materials are provided at Lodging BB1-BB70. Among the materials not used in Club meetings, however, is a booklet entitled *Daily Bread*. Lodging at S3-S20. In its brief before the Second Circuit (Br 27-30), Milford quoted extensively from *Daily Bread*. Prior to the commencement of this litigation, Petitioners' counsel sent a copy of the *Daily Bread* to Respondent's counsel and incorrectly indicated that the Club used the booklet as part of its meetings. This error was later corrected during discovery. Steve Fournier's deposition testimony concerning the use of *Daily Bread* made clear that it was not used during Club meetings. J.A. at P82-P83 (Plaintiffs' Ex. 12, Deposition Testimony of S.D. Fournier and D. Fournier); Pet. Appx. H5, ¶9 (S.D. Fournier Affidavit).

These games are unrelated to the moral value. After the game, the children are dismissed from the Club to go home with their parents. J.A. at P30 (S.D. Fournier Test.).

The Club is not an exclusive organization. Pet. Appx. H5, ¶¶41-45 (S.D. Fournier Affidavit). Its membership is open to children of all faiths or of no faith provided that the child has parental permission to attend the club meetings. *Id.*; Lodging at AA2, ¶¶9-10 (Plaintiffs' Ex. 6, D. Fournier Affidavit). Children are not asked about their denomination or faith. Pet. Appx. H5, ¶43 (S.D. Fournier Affidavit). Children are not required to agree to or accept any religious statement of faith. *Id.*, ¶45. Club members are from diverse religious backgrounds. J.A. at P20 (S.D. Fournier Test.). Children are free not to participate in an activity. *Id.*

While the Club's perspective is decidedly Christian, it neither promotes nor teaches any particular religious denomination's doctrine or theology. Lodging at AA2, ¶11 (Plaintiffs' Ex. 6, D. Fournier Affidavit). The Club neither teaches nor catechizes the tenets of a faith. Pet. Appx. H5, ¶40 (S.D. Fournier Affidavit). The Club is neither affiliated with, sponsored by, nor under the control of any church or denomination. *Id.*, ¶37.

The Club ultimately used Milford facilities from April 1997 to June 1998 pursuant to a preliminary injunction issued by the District Court. *See* J.A. at B4 (Docket Refs.); J.A. at O1-O11 (Plaintiffs' Ex. 11, Decision of Hon. Thomas J. McAvoy dated April 17, 1997, Granting Plaintiffs' Motion for a Preliminary Injunction). There is no evidence in the record of any complaint arising from the Club's use. Nor is there any evidence of any confusion over the Club's status as a private organization.

4. Legal Proceedings Below.

Petitioners brought a civil rights action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of New York challenging Milford's exclusion of religious groups as unlawful and discriminatory. J.A. 31. Petitioners moved for and obtained a preliminary injunction to prevent Milford from enforcing its discriminatory ban against groups that have religious purposes. J.A. at O1-O11 (Plaintiffs' Ex. 11, Decision Granting Plaintiffs' Motion for a Preliminary Injunction). After the Second Circuit Court of Appeals' decision in *Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207 (2nd Cir. 1997), the court directed further briefing on that case's application to the instant action. J.A. at B6 (Docket Ref. 3/30/98).

The parties ultimately cross-moved for summary judgment. J.A. B7-B8. The District Court, following *Bronx Household*, vacated the preliminary injunction and granted Milford's motion. Pet. Appx. C1 (Memorandum Decision and Order dated October 23, 1998); J.A. at B10, and the Club appealed. *Id.*

A divided panel of the Second Circuit affirmed the District Court's decision. Judge Miner, writing for the majority, agreed that Milford had opened its facilities to allow groups to teach moral values and that the Club teaches "secular values such as obedience or resisting jealousy." 202 F.3d at 509, Pet. Appx. at A15. Nevertheless, the majority held that Milford could discriminate against the Club. Critical to the majority's analysis was its conclusion that the Club's speech went beyond the presentation of moral values and included the "Christian viewpoint." The court opined that "[t]he Christian viewpoint, as espoused by Reverend Fournier contains an additional layer [of speech]:"

> these morals or these values are senseless without Christ, that's to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy.

Id. at 509-10, Pet. App. A15-A16 (quoting Deposition Testimony of S.D. Fournier, J.A. at P25).

This "additional layer" of speech, according to Judge Miner's opinion, transformed the subject matter of the Club's speech from the permissible teaching of moral values from a Christian perspective to impermissible religious instruction. *Id.* at 510, Pet. Appx. at A15-A16. Judge Miner concluded, therefore, that Milford's exclusion of the Club from its facilities was based on constitutionally permissible subject matter discrimination, rather than constitutionally impermissible viewpoint discrimination. *Id.;* Pet. Appx. at A18.

Judge Jacobs dissented. He charged that the majority's analysis irreconcilably conflicted with this Court's decision in *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993). *See Good News Club*, 202 F.3d at 513; J.A. at A20-A21. Judge Jacobs believed that Milford had discriminated against the Club because of its Christian viewpoint. 202 F.3d at 512; Pet. Appx. at A27-A28. The crux of the dissent's disagreement with the majority was that "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Id.* at 512, Pet. Appx. at A22. Judge

Jacobs opined:

> the subject matter (of morals and character) is "secular" in the sense that it is often informed by secular perspectives; but the subject matter does not change when it is informed by viewpoints that are sectarian .... No one should be surprised that the religious viewpoint on morality looks very much like religion itself.

Id. at 514; Pet. Appx. at A26-A27. Judge Jacobs concluded that "the club's message is in fact the teaching of morals from a religious perspective" and that exclusion of the Club from the use of school facilities therefore violated the First Amendment. *Id.* at 515.

SUMMARY OF ARGUMENT

Milford Central has decided to allow a broad range of Milford community groups to meet in its facilities after the close of the instructional day, including youth organizations that seek to develop children's moral and spiritual character. Out of all the methods and perspectives that could be employed to develop a child's moral and spiritual character, Milford has singled out one perspective for adverse treatment – the religious perspective.

The United States Constitution did not require Milford to open its facilities after hours for expressive speech. However, once Milford opened its facilities to some speech, it triggered constitutional scrutiny of its decisions which speech to include and which to exclude. Milford's discriminatory exclusion of speakers with "religious purposes" was neither viewpoint neutral nor reasonable, and thus was unconstitutional in the limited public forum at issue in this case.

Petitioners will advance three arguments why Milford's exclusion of the Club from its forum was unconstitutional. First, Milford's exclusion of the Club was not viewpoint neutral. Milford has no objection to renting to groups that teach moral precepts without reference to God. Indeed, Milford has no apparent objection to a group using facilities to teach children that God is unnecessary for moral growth. Respondent objects only when the speaker adopts the viewpoint that a relationship with God is necessary to have the spiritual strength to live out moral values. In other words, the subject matter is fine, but the Christian viewpoint is not. Such viewpoint discrimination violates the Constitution absent a compelling state interest. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993).

Second, the exclusion of religious subject matters, and only religious subject matters, from a forum whose purpose is to serve the welfare of the community, advances no state interest and is unreasonable. The forum created by Milford is eminently compatible with Petitioners' speech. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788, 803 (1985). Moreover, it is fundamentally unreasonable, and therefore unconstitutional, to make the sole test of entrance to school facilities a "religious purpose" examination. It is axiomatic that "government may not use religion as a basis for the imposition of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J. concurring). The Constitution, as expressed by the Free Exercise Clause and the Establishment Clause, does not view religious segregation as a reasonable exercise. *See Board of Ed. of Kiryas Joel School Dist. v. Grument*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring).

Third, Milford can demonstrate no compelling interest sufficient to justify its suppression of the Club's viewpoint on morality. In particular, allowing the Club to use Milford's facilities on the same terms as other youth groups does not violate the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 272 (1981). Any Establishment Clause violation must be moored in governmental speech or action. There are no government actions or speech shown in this case that tend to establish a preference for or endorsement of religion.

Milford has not composed, sponsored, or promoted the Club's speech. Since Milford allows virtually unfettered access to school facilities, it has not communicated to the community that it affords special treatment to children who attend the Club based upon their religious beliefs. Milford has not manipulated its forum to smuggle Christianity into the school as the exclusive method of promoting moral and spiritual development. The contrary is true – it has allowed a number of youth organizations to use its facilities, while singling out the Club for exclusion. Under these circumstances this Court has repeatedly rejected the proposition that the Establishment Clause can be used to silence speech. *See Rosenberger*, 515 U.S. at 845-46, *Board of Educ. v. Mergens*, 496 U.S. 226, 248-51 (1990)(plurality), *Widmar v. Vincent*, 454 U.S. 272, *Lamb's Chapel*, 508 U.S. at 395, *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 765 (1995).

ARGUMENT

I. RESPONDENT'S EXCLUSION OF THE CLUB FROM ITS FORUM WAS NOT VIEWPOINT NEUTRAL

A. Milford Has Created a Limited Public Forum.

A public school may, at its discretion, open its facilities to the community to create a forum for speech. *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993). A school may create its forum either by policy or practice. *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 406 U.S. 37, 47 (1983). Once a school opens its facilities to the general public for speech unrelated to school functions, it has created a public forum. *Perry*, 460 U.S. at 46. *See ISKCON v. Lee*, 505 U.S. 673, 678 (1992) (where government opens it property as a service to the general public for expressive activities, it has created a public forum). *Accord Grace Bible Fellowship v. Maine School Admin. Dist. 5*, 941 F. 2d 45, 48 (1st Cir. 1991) (Breyer, J., on panel).

In a government created limited public forum, government may ordinarily *limit* eligibiity to the forum to a certain category of speakers or subjects. *See Widmar v. Vincent*, 445 U.S. 272 (1981) (recognizing a public university could limit the use of its facilities to its students). If the government places limits on which subject matters and speakers to allow in its forum, such limitations must, at a minimum, be viewpoint neutral and reasonable in light of the purposes the forum serves. *Rosenberger*, 515 U.S. at 829 (applying viewpoint neutrality test to strike down the exclusion of religious speech in a limited public forum). *But see ISKCON*, 505 U.S. at 678 (a restriction on speech in a "public forum, *whether of a limited or unlimited character* ... is subject to [strict scrutiny].") (emphasis added). *See also Widmar*, 454 U.S. at 273-76 (applying the strict scrutiny analysis to the exclusion of religious

speech from a limited public forum).[2] Nonetheless, where, as here, the government has intentionally designated a place or means of communication as a public forum, speakers who are otherwise eligible for the forum without regard to their viewpoint cannot be excluded absent a compelling government interest. *Perry*, 460 U.S. at 45; *see also Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (while government may limit a forum to specific subject matters, it can not confine the forum "to one category of interested individuals").

In applying the forum doctrine in the context of religious speech, this Court has held that government cannot exclude religious speakers from a limited public forum, *Lamb's Chapel*, 508 U.S. at 393, because religious speech can be both an area of inquiry and a viewpoint on various subjects. *Rosenberger*, 515 U.S. at 831. In particular, when an otherwise eligible group or speaker seeks to use a limited public forum to worship or to teach biblical principles, the government must demonstrate a compelling state interest to censor such speech from its forum. *Widmar*, 454 U.S. at 269-70.

The Second Circuit agreed with the parties below that Milford's facilities, after school hours, are a limited public forum. 202 F.3d at 509; Pet. Appx. at A13. Milford, by policy, has opened its facilities to the general public for the "limited" purposes of uses "pertaining to the welfare of the community" and "for the purposes of instruction in any branch of education, learning or the arts." Pet.

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[2] *See also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 750 (1996) (plurality opinion of Breyer, J., joined by Stevens, O'Connor, and Souter, JJ.) (noting that it is an open question whether content limitations on the scope of a designated public forum trigger strict scrutiny).

Appx. at D1. In addition to its policy of general access, Milford, by its practice, has opened its facilities to youth organizations for the purpose of developing children's moral and spiritual character. *See generally* Lodging at Y1-AA5.[3]

There is no dispute that the Club is otherwise eligible to use school facilities and that youth clubs may use school facilities after school hours for expressive activities. The Club is a youth organization that seeks to aid children's moral and spiritual development by using Bible stories to teach such "[moral] values as obedience or resisting jealousy." *Good News Club*, 202 F.3d at 509; Pet. Appx. at A15. The question presented herein is whether Milford may selectively expel the Club from school facilities because it has a religious purpose.

B. Respondent Excluded Petitioners from Its Forum Because of the Club's Viewpoint.

This case at its core is not complicated. Milford has opened its facilities after school hours to speech that develops the moral and spiritual character of children and to uses that pertain to the welfare of the community. Milford has no objection to groups that teach

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[3] The Boy Scouts use school facilities to influence a boy's character development and spiritual growth. See Lodging at Y3 (describing the Scouts as having the following purpose: "[To] influence a boy's character development and spiritual growth"). The Girl Scouts use school facilities "to inspire girls with the highest ideals of character, conduct, patriotism, and service." Lodging at Z2, ¶4. The 4-H Club uses the school for the purpose of enabling youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults. Lodging at AA5, ¶8.

moral precepts without reference to God. Indeed, Milford has no apparent objection to a group using facilities to teach children that God is unnecessary for moral growth.

It is undisputed that the Club speaks to the moral and spiritual development of children. Milford objects to the Club's speech only because it adopts the viewpoint that a relationship with God is necessary to have the spiritual strength to live out moral values.[4]

In other words, the subject matter is fine, but the Christian viewpoint is not. Because "[t]he prohibited perspective, not the general subject matter," triggered the decision to bar private expression, Milford's exclusion of the Club from its facilities is not viewpoint neutral.

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[4] Superintendent Livshin testified:

> Q: Pursuant to the description of the Good News Club as outlined in Exhibit D [the school use application which described the club's meetings as consisting of a fun time of singing songs, hearing a Bible lesson, and learning scripture], would the Good News Club qualify for use of the school facilities?
>
> A: Again, the problem that I have that I would need clarification on, children hear Bible story [sic] and learn Scripture, I don't know in what sense – in what sense that would mean. Is the Scripture being presented – how do I want to say this? In a historical approach ... – or is it used to promote the gospel. And if that's indeed the case, then I have a problem with it in terms of using the school for that purpose.

J.A. at N17-N18.

This is certainly not the first time this Court has examined the exclusion of an otherwise eligible user from a limited public forum because of its religious purpose. In *Lamb's Chapel*, this Court reviewed a church's request to use public school facilities after hours to show a six-part film series that exhorted parents in the community to fight "society's slide towards humanism" by instilling Christian values in their children. 508 U.S. at 388. One portion of the series related to viewers how to rely on God to handle difficult family problems. *Id.* at 388-89, n.3. The school district in *Lamb's Chapel* relied upon a school use policy almost identical to the policy involved in this case. The policy allowed virtually all community speakers, except those with a "religious purpose," to use school facilities. 508 U.S. at 387. Pursuant to this policy, the school district denied the church use of its facilities because the film "proselytiz[ed] the Christian [religion's] approach to family values." *See* Brief on the Merits for Respondent Center Moriches School Dist. at p.1, 4, 26. The Second Circuit (per Judge Miner) upheld the school district's decision, finding that the film had a religious purpose. *Lamb's Chapel*, 959 F.2d 381 (2nd Cir. 1992).

This Court, reversing the Second Circuit, noted that the issue was not whether the film had a religious purpose, but whether it spoke to child rearing from a religious standpoint. *Id.* at 393. Similarly, the issue in this case is not whether the Club's speech has a religious purpose, but whether its speech fits within the subject matter of "the promotion of the moral and spiritual development of children" or "uses pertaining to the welfare of the community."

It is not disputed that Club meetings help to promote the moral and spiritual development of its child members, and that the Club's use pertains to "the welfare of the community." In particular, the Club explains to children how to deal with such issues as jealousy

and anger. Such discussions are plainly within the boundaries of the forum. Milford did not exclude the Club because its activities did not fit within the religion-neutral boundaries of the forum. Rather, Milford excluded the Club because of its religious purpose. The Club's speech deserves the same First Amendment protection as a church's speech urging that parents return to Christian family values. *Lamb's Chapel* is squarely on point and thus controls this case.

It is difficult to discern why the Second Circuit in the present case declined to hold that *Lamb's Chapel* supplied controlling authority in this case, since Judge Miner's opinion fails to cite the Supreme Court's *Lamb's Chapel* decision.[5] The Second Circuit reasoned that the Club, by inviting its members to establish a relationship with Christ, was teaching more than moral values – it was teaching religion. Nonetheless, presuming that *Lamb's Chapel* theoretically left the door open to such an approach, this Court's subsequent decision in *Rosenberger* unequivocally closed it. In *Rosenberger*, a student organization requested, but was denied, funding for a Christian periodical called *Wide Awake*. 515 U.S. at 825-27. The purpose of *Wide Awake* was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. The masthead of every issue contained St. Paul's exhortation in Romans 13:11 of the New Testament that "[t]he hour has come for you to awake from your slumber, because our salvation is nearer now than when we first believed." *Id.* at 865-66. Each issue of *Wide Awake* invited

[5] Petitioners relied upon *Lamb's Chapel* in their brief before the Second Circuit, and Judge Jacobs in dissent said, "I cannot square the majority's analysis in this case with *Lamb's Chapel*." 202 F.3d at 513.

the students to accept Jesus Christ as their savior:

> The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation. Thus, Christians must confront and condemn sin, or else they fail in their duty of love. Mourad & Prince, A Love/Hate Relationship, November/December 1990, p. 3.

Id. at 865.

Wide Awake's essays on other topics also challenged and invited students to establish a relationship with Christ. For example, while an article on racism had some general discussion on the subject, it "proceed[ed] beyond even the analysis and interpretation of biblical texts to conclude with the counsel to take action because that is the Christian thing to do." *Id.* at 866-67. In similar fashion an article on eating disorders challenged and invited students to ask Christ for help with their problems. *Id.* at 867.

After reviewing *Wide Awake*'s speech, this Court rejected the proposition that speech with an evangelistic component occupies second-class status. The Court expressly rejected the view that the government could constitutionally undertake to distinguish between "works characterized by evangelism and writing that merely happens to express views that a given religion might approve." *Rosenberger*, 515 U.S. at 844. Rather, the Court held that *Wide Awake* presented a Christian perspective on how to overcome racism and eating disorders and that censorship of that perspective was unconstitutional. *Id.* at 845.

A challenge to Christians and an invitation to believe to non-Christians are integral elements of a Christian viewpoint. The

propagation of ideas by asking listeners to adopt them is not unique to Christianity – it is the essence of advocacy. *See, e.g., Thomas v. Collins*, 323 U.S. 516 (1945). Milford will not let the Club use school facilities because of the Club's viewpoint. Milford's discrimination violates the First Amendment absent a compelling state interest.[6]

C. The Second Circuit's Decision Destroys the Viewpoint Discrimination Doctrine and Excessively Entangles Government With Religion.

The decision below is deeply flawed. The Second Circuit detoured from this Court's precedents on viewpoint discrimination and strayed into an analysis based on a semantic shell game. The Second Circuit engaged in a two-step analysis. First, the court labeled the Club's speech as religious instruction rather than instruction of morals from a religious perspective. Second, the court

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[6] Respondent, in the courts below, has attempted to distinguish this Court's precedents on viewpoint discrimination on the basis that the Club's speech is directed to a child audience. This distinction is irrelevant. Whether a government rule discriminates against a speaker's viewpoint is independent of the nature of the audience. While the identity of the audience might supply a potential justification for state censorship in certain arenas (*e.g.*, pornography), the state has no interest in restricting private religious expression to children. State restrictions on a private speaker's religious expression directed towards children who are assembled at the behest of parents would be constitutionally suspect. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

reasoned that religious instruction is a "quintessentially" religious subject matter that demonstrated that the Club had a "religious purpose." 202 F.3d at 510. *See* Pet. Appx. at D2 (Milford's policy excludes speakers with religious purposes from using school facilities).

There are multiple problems with the Second Circuit's analysis. It is a logical fallacy to conclude, as the Second Circuit did, that expression which may be characterized by one subject label ("religious instruction"), cannot also be described by another ("instruction in any branch of education, learning, or the arts" or a use "pertaining to the welfare of the community"). The *Widmar* Court spoke to this issue, noting that distinctions between religious speech and religious worship lack an "intelligible content." 454 U.S. at 269, n. 6. Speech can fit easily into multiple topical categories. In particular, a speaker's perspective on a subject matter can almost always be labeled as instruction on the perspective. Thus, teaching moral virtues from a religious perspective may qualify both as teaching morality and teaching religion, just as teaching economics from a Marxist perspective qualifies both as teaching economics and teaching political philosophy.

The Second Circuit failed to recognize that religious speech, like other types of philosophical speech, may be *both* a "vast area of inquiry" and also a "perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831. This is particularly true when the subject under discussion is morality and the viewpoint is religious. *See Good News Club*, 202 F.3d at 512 ("when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters").

Such arbitrary and ultimately subjective line-drawing exercises do not further the purposes of this Court's forum analysis. Permitting the state to label speech at will eviscerates the concept of viewpoint discrimination, since every viewpoint exclusion could be recast as a subject matter exclusion. Government officials could avoid the First Amendment prohibition on viewpoint discrimination in a limited public forum by gerrymandering the forum along viewpoint lines and calling the restrictions merely limits on the forum. It would be a perverse result to allow the illegal act of government discrimination against a speaker's viewpoint to become a legitimate justification for creating a limitation on the scope of the forum. *See Denver Area Educ. Telecom. Consortium v. F.C.C.*, 518 U.S. 727, 801 (1996) (Kennedy, J. joined by Ginsburg, J., concurring in part and dissenting in part).

The appropriate test, in order to give meaning to this Court's forum analysis, is whether the speech fits within the subject matter allowed in the forum, not whether the speech could also be characterized as a subject matter excluded from the forum. As Judge Jacobs explained in his dissent below: "religious answers to questions about morality tend to be couched in overtly religious terms and to implicate religious devotions, but that is because the sectarian viewpoint is an expression of religious insight, confidence or faith– not because the religious viewpoint is a change of subject." *Good News Club*, 202 F.3d at 514, Pet. Appx. at A25.

The Second Circuit's endeavor to determine if religious speech should be labeled as religious instruction or worship inexorably operates to entangle school officials with religion. In *Widmar*, this Court warned that inquiries into the significance of religious words and practices tend inevitably to entangle the state with religion in an unconstitutional manner. *Widmar*, 454 U.S. at 269-70. *Accord*

Rosenberger, 515 U.S. at 844 (cautioning against "scrutinizing the content of speech, lest the expression in question – speech otherwise protected by the Constitution – contain too great a religious content"). The Second Circuit ignored this warning and explicitly commended school officials for scrutinizing the significance of religious speech and then making essentially theological classifications as to whether that speech constituted religion, worship or instruction.

The Second Circuit's decision forces school officials to probe into private matters of conscience protected by the Constitution. Each time an applicant requests to use school facilities for what arguably might be construed as a "religious purpose," school officials must interrogate the applicant as to his beliefs and practices to determine if he is engaging in religious worship or instruction. That is precisely what happened in the case before the Court. First, Respondent and its lawyers scrutinized the religious dimension of the Club's intended use. Then, in litigation, Milford asked intrusive, probing questions about religious elements of Club activities. *See, e.g.*, J.A. at P16 (Q: "What are the nature of the prayers that are said by the Good News Club as part of its regular activity?"); *id.* at P22 (Q: "And in the opening prayer, what specifically are you praying for?"); *id.* at P25 (Q: "Are there references to God or Jesus Christ in any of the songs that you sing in the club meetings?") (Plaintiffs' Ex. 12, S.D. Fournier Deposition Testimony).

If determining whether speech should be labeled "religious" becomes the touchstone of constitutional freedoms, then school administrators must become theological authorities and federal courts will become a battleground for theological disputes. The Constitution forbids this. See *Widmar*, 454 U.S. at 269-70, n.6 (To draw a distinction between religious worship and religious speech does not "lie within judicial competence to administer.").

See also Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("Nor is it in the competence of the courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."). To draw such a distinction would require the courts to inquire into the religious significance of words and practices and, in the words of this Court, "inevitably [] entangle the State with religion in a manner forbidden by our cases." *Widmar*, 454 U.S. at 270, n.6.

D. The Prohibition of Religious Instruction in Favor of Secular Instruction Inherently Discriminates Against the Religious Viewpoint.

The Second Circuit's analysis distills Milford's policy, in essence, to prohibit religious instruction but not secular instruction. Such a regime inherently discriminates against the religious viewpoint.

Milford has never asserted that speech that instructs listeners to reject religion (*e.g.*, advocacy of the teachings of Karl Marx, Bertrand Russell, and Jean-Paul Sartre, *see Rosenberger*, 515 U.S. at 837) is excluded from its forum. In fact, on the subject matter of morality, Milford's policy allows community groups to discuss the subject and to instruct others from their secular perspective. In contrast, where religious viewpoints on the same subject are presented, community groups may not instruct. Such a policy is not viewpoint neutral. *Bronx Household of Faith v. School Dist. No. 10*, 127 F.3d 207, 220 (2nd Cir. 1997) (Cabranes, J., dissenting). As the Tenth Circuit observed in *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996):

> A prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

Id. at 1279.

There are few more fundamental divides than the divide between those who believe that morality is independent of the will of a divine Sovereign and those who believe the two are indivisible. The Club, of course, adopts the viewpoint that morals without God are "senseless." J.A. at P25 (Plaintiffs' Ex. 12, Deposition Testimony of S.D. Fournier). By insisting that the Club's speech does not qualify as "pure" moral instruction, 202 F. 3d at 511, the Second Circuit has sanctioned the expulsion of religious viewpoints from the discussion of morality in the limited public forums within its jurisdiction. This Court should firmly repudiate such a decision as fundamentally incompatible with its historical protection of the views of all members of the community.

II. MILFORD'S DISCRIMINATORY EXCLUSION OF THE CLUB FROM ITS FORUM WAS UNREASONABLE.

Even if Respondent's exclusion of the Club from its property were viewpoint neutral, Respondent must still demonstrate that its exclusion of Petitioners was reasonable in light of the purposes served by the forum. *See Rosenberger*, 515 U.S. at 829-30 (content discrimination is only permissible where it preserves the

purposes of the limited public forum). As the Court suggested in *Lamb's Chapel*, the exclusion of all speakers with a religious purpose may be unreasonable on its face. 508 U.S. at 393, n. 6. Further, the purpose of Milford's forum, as expressed by its own policy statement, is to serve "the welfare of the community." The exclusion only of religious subject matters from a forum whose purpose is to serve the welfare of the community is unreasonable. The chief end of most religious instruction is to provide a sense of duty beyond one's own selfish interest. To instruct and teach others to place the community's good above their own would seem to be the paradigmatic example of speech that promotes the community's welfare. The inclusion of religious content in Milford's forum does not threaten to change the nature or the purposes of the forum.

Moreover, it was constitutionally impermissible to make the sole test of entrance to school facilities a "religious purpose" examination. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons."). To exclude only speakers with religious purposes in a forum that is otherwise open to the entire population of Milford is the essence of unreasonable religious discrimination. It is axiomatic that "government may not use religion as a basis for the impositions of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J. concurring). Neither the Free Exercise Clause nor the Establishment Clause contemplates religious segregation as a reasonable exercise. See *Board of Ed. of Kiryas Joel School Dist. v. Grument*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring) ("Just as the government may not segregate people on the account of their race, so too it may not segregate on the basis of religion.").

Milford has never argued that religious subject matters do not serve the welfare of the community. The reason Milford offered to justify its exclusion of the Club, and the Second Circuit accepted, "was that activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer, and ... it [is] eminently reasonable that Milford school would not want to communicate to students of other faiths that they were less welcome than students who adhere to the Club's teachings." *The Good News Club*, 202 F.3d at 509; Pet. Appx. at A15.

It is not at all reasonable to suppress one private speaker in order to make others feel "welcome." It strains credulity to read a school's allowance of religious speakers on the same terms as non-religious speakers as a deprecation of non-adherents' beliefs. Allowing the Club's religious speech on the same basis as the Boy Scouts, Girl Scouts, 4-H Club, or other eligible youth organizations does not mean that Milford has communicated to certain students that they are not welcomed.[7] The converse is true – Milford has communicated to members of the Club that they and they alone are unwelcome because of their Christian beliefs. Such a selective exclusion is inherently unreasonable. Milford allows the Boy Scouts and Girl Scouts to use its facilities, although both groups require an oath of fealty to God – a "religious exercise" (*see Lee v. Weisman*, 505 U.S. 577 (1992)) – to participate. What inference would an atheistic student draw from being excluded from the Scouts? Obviously, Milford does not itself take seriously the notion that such

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[7] All clubs or organizations appeal to a subset of the community. Indeed, in *Lamb's Chapel*, a film about instilling Christian values in children may have had limited appeal to non-Christians, but that fact alone was not a reason for the school to deny use of its facilities to show the film, nor should it be in this case.

a student would infer that Milford did not welcome atheistic students, since it allows the Scouts to use its facilities.

III. MILFORD CAN DEMONSTRATE NO INTEREST SUFFICIENTLY COMPELLING TO JUSTIFY ITS SUPPRESSION OF THE CLUB'S RELIGIOUS VIEWPOINT.

Respondent, like the school district in *Lamb's Chapel*, offers compliance with the Establishment Clause as a state interest sufficiently compelling to justify its suppression of the Club's religious viewpoint. No Establishment Clause violation arises, however, from allowing the Club to use Milford facilities on equal terms with other youth organizations. *Widmar;* 454 U.S. at 273-75, *Mergens,* 496 U.S. at 247-49; 252, *Lamb's Chapel,* 508 U.S. at 395; *Capitol Square,* 515 U.S. at 770; *Rosenberger,* 515 U.S. at 845-46.

A. By Allowing the Club to use Milford's facilities On the Same Basis as Other Youth Groups, Milford Does Not Violate the Establishment Clause.

One constant and guiding star in the vast and uncertain universe of Establishment Clause jurisprudence is the principle that if government remains neutral towards religion, it is unlikely to violate the Establishment Clause. *See Rosenberger*, 515 U.S. at 839 ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."); *id.* at 846 (O'Connor, J., concurring) ("The insistence on government neutrality toward religion explains why we have held that schools may not discriminate

against religious groups by denying them equal access to facilities that the schools make available to all."). *Capitol Square*, 515 U.S. at 764 (plurality) ("As a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral polices.").

Many times government has pressed this Court to eschew principles of neutrality and to accept discrimination against religious speakers on the basis of the Establishment Clause. This Court has "[m]ore than once … rejected the position that the Establishment Clause justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839.

This Court, in a series of cases, has applied the principle of neutrality in the context of private religious speakers seeking equal access to a government created forum.[8]

The Court first addressed the issue in *Widmar*, *supra,* where a religious student group sought to use university facilities on the same basis as other student groups to sing hymns, pray, and discuss the Bible. 454 U.S. at 265. The University contended that it could

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[8] Petitioners in this section have not included an analysis of equal access cases in the funding context such as *Rosenberger*, *supra* and in the context of government forums created expressly to aid a government mission. *See e.g.*, *Mergens*, *supra* (the federal government mandated that secondary schools officially recognize student religious clubs and give them equal access to school facilities on the same basis as other officially recognized non-curricular student clubs.) These cases do have application by analogy, however.

not permit religious student groups to use its facilities on the same basis as other groups without violating the Establishment Clause. *Id.* at 265. This Court disagreed, holding that insofar as the forum was available to a broad class of speakers the University did not "confer any imprimatur of state approval" on religious speakers. *Id.* at 274. Thus, there was no Establishment Clause violation.

Similarly, in *Lamb's Chapel*, this Court unanimously held that a school district could not rely on the Establishment Clause to bar a church group from showing a religious film that urged parents to instill Christian values in their children. The Court stated:

> We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been opened to the public, not just church members. The forum is opened to a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

508 U.S. at 395.

Finally, in *Capitol Square*, the Court held that the Establishment Clause did not bar a private group from erecting a large Latin cross in a park that the government opened for expressive activities. The Court explained:

> The factors that we considered in *Lamb's Chapel* and *Widmar* exist here as well. The State did not sponsor [the] expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

515 U.S. at 763.

The Court's decisions addressing access by religious speakers to government-created forums yield two guiding principles. First, religious speech conducted in the forum must be truly private; the state must neither sponsor, promote, nor encourage the religious expression. Second, the forum must be open to a variety of groups and not manipulated by the government to give religious speakers preferential treatment.

The record adduced in this case clearly demonstrate that the Club meetings involve purely private speech and that Milford's facilities are opened to a variety of private youth organizations. Consequently, as in *Widmar*, *Lamb's Chapel*, and *Capitol Square*, there is no Establishment Clause violation in permitting the Club access to school facilities on the same basis as other youth organizations. First, the Club's speech is private. As this Court has said, "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion) (emphasis in original). Milford does not prompt, compose, suggest, nor mandate Petitioners' speech. Milford does not distribute ads or flyers or in any way promote Club meetings. Mr.

and Mrs. Fournier are neither employed by the school nor any other government agency, and conversely, no teacher or Milford employee is involved with the Club. Children attend the Club meetings by parental choice and are in no way coerced to attend Club meetings.

Second, Milford has not given the Club preferential treatment. Milford has not manipulated its forum to smuggle Christianity into the school as the exclusive method of promoting moral and spiritual development. The contrary is true. The school allows after-hours use of its facilities to the Scouts, 4-H Club, sporting programs, and other community groups, while the Club has been selectively excluded.

Allowing the Club to participate in Milford's forum would promote rather than violate the neutrality principle. Under these circumstances this Court has repeatedly rejected the proposition that the Establishment Clause can be used to silence speech. *See Rosenberger*, 515 U.S. at 839 ("more than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design"). *See also Mergens*, 496 U.S. at 252 (the broad spectrum of groups that are free to enter the forum counteract any possible message of official endorsement of or preference for religion).

B. By Granting the Club Equal Access to Milford's Facilities, Milford Does Not Communicate an Endorsement of the Club's Message.

Milford seeks dispensation from this Court's precedents and the neutrality requirement of the Establishment Clause because the

Club's speech (like other youth organizations) is directed towards grade school children. Milford posits that a Club member might falsely perceive that the Club's speech is actually the school's speech. There are numerous conceptual difficulties with Milford's argument, however.

First, impressionability must be seen as the two way street that it is. Allowing equal access to school facilities by all youth organizations conveys a message of neutrality toward religion and not government endorsement of religion. Denying the Club access would communicate to children that the government disfavors religious activities. "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion [in violation of the Establishment Clause]." *Mergens*, 496 U.S. at 248 (plurality); *accord Rosenberger*, 515 U.S. at 845-46. Milford cannot selectively invoke a child's misperception that Milford has endorsed a religion while disregarding a child's perception that Milford has an antipathy towards religion.

Second, Milford's fear of a mistaken inference of endorsement of the Club's speech "is largely self-imposed, because the school itself has control over any impressions it gives its students." *Mergens*, 496 U.S. at 251. Speech is the best weapon to combat false impression, not censorship.[9] Milford would have this Court

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[9] Additional speech to dispel false impression is not only the best weapon, it is the constitutionally required weapon. *See Whitney v. California*, 274 U.S. 357, 375-76 (1927) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary"). As in *Capitol Square*, "a flat denial of the ... application was not the

jettison that principle for the sake of a hypothetical child who might falsely perceive that Milford has established or endorsed the Christian religion. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting on other grounds) ("utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform individual expression of religious belief into *state* advancement of religion") (emphasis in original).

Third, if Milford's argument were accepted, then this Court's precedents concerning the free speech rights of religious speakers would have to be rewritten to accommodate the myriad of situations in which a small child could observe, and potentially misunderstand, the exercise of religious speech in a public forum or by a public person. Suppose, for example, that a Milford grade school student were to pass by a high school classroom and observe a *Mergens* Bible club; is the *Mergens* club unconstitutional in Milford and other small schoolhouses around the country simply because younger students may be nearby? The constitutional right to free speech is extremely fragile if it can be shattered by the *potential* false perception of a six-year-old child. The First Amendment was not meant to be fragile, but robust. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[government's] only option to protect against an appearance of endorsement." 515 U.S. at 793 (Souter, J., concurring). Even if Milford's fear of endorsement were legitimate, this would not justify a total exclusion of the Club from school facilities where other alternatives were available. *Cf. United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (where content-specific prior restraint established, least restrictive means must be applied).

Moreover, Respondent's own actions betray the weakness of its argument. If Milford were truly concerned that children were unable to distinguish between Club meetings and classroom instruction, after the preliminary injunction was issued, Milford would have issued some sort of disclaimer or taken similar steps to make clear to the children that the Club's speech was not the school's speech. No such disclaimer or explanation was offered to the children or their parents.[10]

Further, Milford has presented no evidence, either actual or theoretical, to support Milford's contention that children between 6 and 12 years of age cannot distinguish a private group's after school speech from a teacher's classroom speech. Indeed, the facts suggest it is unlikely that any child would be confused that a Club meeting is classroom instruction. This is not a case where a public school teacher has used the classroom as a forum to promote the activity of the Club. This is also not a case where an elementary school teacher or administrator is in any way involved with the operation of the Club. There is a clearly comprehensible distinction between a multi-aged youth meeting conducted after school which a child (with parental consent) voluntarily chooses to attend, on the one hand, and speech conducted by a teacher in the classroom which a child has no choice but to attend on the other.

---

[10] The District Court granted Petitioners' motion for a preliminary injunction on April 14, 1997. J.A. at 01-011. In the spring of 1997, the Club began using Respondent's facilities. The Club continued to hold its meetings at Respondent's facilities (in a location of Respondent's choice) for the 1997-98 academic year. There is no evidence in the record of any complaint arising from the Club's use. Nor is there any evidence of any confusion over the Club's status as a private organization.

Moreover, the District Court found that children who do not attend the Club meetings were unlikely to see or hear a Club meeting:

> The fear that [Milford] has expressed of confusion of the young non-member students at Milford is sufficiently minimized by the fact that the meetings are not being held during school hours and in a location other than the classrooms. Thus, there is less chance that the students will witness the meetings or mistakenly perceive the meetings as part of their state sponsored curriculum.

J.A. at O10 (Decision of Hon. Thomas McAvoy dated April 17, 1997). *Cf. Capitol Square*, 515 U.S. at 811 (Stevens, J., dissenting) (noting that while a religious symbol visually displayed represents an image of endorsement, access to government facilities for "the religious practices" involved in *Widmar* and *Lamb's Chapel* "were simply less obtrusive, and less likely to send a message of endorsement.")

Finally, and perhaps most importantly, Milford does not communicate endorsement of the Club's message to the community at large. *See Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring) (endorsement test is concerned "with the potential community writ large, ... not about the perceptions of particular individuals"). Given the openness of the Club meetings and the unfettered access to Milford's facilities after school (allowing uses pertaining to the welfare of the community), no parent reasonably would feel that their child is being excluded from opportunities that the government affords to the children who attend the Club. Parents who do not subscribe to the Club's message have the opportunity

to establish their own clubs after school or to send their child to the other youth groups who already use the school. As in *Widmar*, "by creating a forum [the school] does not thereby endorse or promote any of the particular ideas aired there." 454 U.S. at 271, n.10.

As Justice O'Connor has explained in a different context, when government indirectly aids a religious mission only through independent choices made by parents, "no reasonable observer is likely to draw from the facts an inference that the State is endorsing a religious practice or belief. Rather the endorsement of the religious message is reasonably attributed to the individuals who select the [religious] path." *See Mitchell v. Helms*, ___ U.S. ___, 120 S. Ct. 2530, 2559 (2000) (O'Connor, J., concurring). The same is true in this context – a reasonable observer would not infer that Milford endorses the Club's message, but would attribute the endorsement of the Club's message to the parents who allow their children to attend club meetings.

In the end, Milford essentially argues that impressionability of its students requires it to shed the protective cloak of neutrality and to display hostility towards religion. As this Court has said, however, withholding equal access to religious speakers "would leave an impermissible perception that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). *See also Mergens*, 496 U.S. at 248 (plurality opinion) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion"). Milford's argument that it should be exempt from this Court's equal access precedents and the neutrality requirement of the Establishment Clause is without merit.

CONCLUSION

The Good News Club asks only the same opportunity that Milford gives every other youth organization in the community – the opportunity to use school facilities to conduct its meetings. Milford has decided to open a forum, a market place, for community groups to promote the moral and spiritual development of children. The Good News Club is forbidden from entering that marketplace and offering the parents of the Milford community the opportunity to choose to have their children to hear about morality from a religious perspective. This is contrary to the decisions of this Court and contrary to our nation's most fundamental belief that the blessings of freedom and liberty are secured by a marketplace of ideas free from viewpoint discrimination. Wherefore, Petitioners respectfully request that the judgment of the Second Circuit be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLENE FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

The Good News Club ("Good News") is a religious organization, sponsored by the Children Evangelism Fellowship Inc., a worldwide Christian ministry, which is committed to the spreading of the gospel of the New Testament. In the fall of 1996, a local chapter of the Good News Club, which was sponsored by Rev. Stephen Fournier, a minister, and his wife Darlene, requested to use the Milford Central School District building for weekly meetings of Good News. The activities of Good News consisted of religious instruction and religious indoctrination and the Milford Central School District rejected the application. This lawsuit resulted.

Milford Central School District ("Milford") is a public school district and municipal corporation located in Otsego County, New York. Milford consists of a single school building that houses all grades of the district, K-12. Milford educates approximately 530 students of ages 5 through 18. As a public school district in New York, its facilities are open for use by the public in accordance with New York Education Law § 414. Milford had a Community Use of School Facilities policy which was in effect at the time that the Petitioners applied for permission to utilize Milford's facilities. Petition for Writ of Certiorari at D1-D3.

Milford denied the Petitioners' application for use of the building following a thorough review of the program, upon the ground that the program was the "equivalent of religious worship" which was prohibited under the Respondent's policy. Joint Appendix ("J.A.") at H1-H2. Upon the completion of pre-trial discovery, both parties moved for summary judgment upon facts which were largely stipulated. The District Court found, as a matter of fact, that Good News was in a different genre than Boy Scouts, Girl Scouts, and 4-H Clubs in that Good News dealt specifically with religious subject matter, not as Petitioners contend, a religious perspective on a secular subject matter. *See* Petition for Writ of Certiorari at C30-C31. The Circuit Court made the same factual findings and affirmed

the District Court's findings of fact that Good News was involved in religious instruction and worship, not a secular subject from a Christian perspective. *See* Petition for Writ of Certiorari at A16. We also note that the Petitioners did not challenge these factual findings upon appeal to this Court. There was no evidence and no argument that these factual findings by the District Court and the Court of Appeals were "clearly erroneous." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948); *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 497-501 (1984).

The Petitioners have presented a version of the "facts" which is at odds with the record evidence and the findings of the courts below. For this reason, Respondent recites the relevant facts, at some length.

Good News club meetings were open to children between the ages of 5 and 12. Petitioners initially described the activities of Good News as "a group of boys and girls meeting one hour a week for a fun time of singing songs, hearing a Bible lesson and memorizing scripture." Lodging at W1. Petitioners requested the use of a classroom or room in Milford on Tuesday afternoons beginning at 2:30 p.m. and ending at 4:30 p.m. Milford's class day ended at 2:56 p.m. each school day. The Good News meeting occurred between 3:00 p.m. and 4:00 p.m. Lodging at W1. The additional time, i.e. 2:30 p.m. to 3:00 p.m., was for "set up." The time from 4:00 p.m. to 4:30 p.m. was for "clean up."

The meetings of Good News were conducted by Rev. Stephen Fournier who is and was the pastor of the Milford Center Community Bible Church. J.A. at P4. Rev. Fournier described himself as a village missionary who provided full time pastoral leadership to small churches in the rural area. J.A. at P4.

Prior to the Petitioners requested the use of Milford for Good News meetings, the club met at the Milford Center Community Center Bible Church (J.A. at P10) and had approximately 8 to 10 students in regular attendance at its

meetings (J.A. at P12). The meetings held at the Milford Center Community Bible Church began at approximately 3:30 p.m. each Tuesday. J.A. at P92-P93. At that time, the children were transported from Milford to the church, via school buses. As a matter of courtesy, Milford had permitted its children to travel to the Milford Center Community Bible Church as passengers on a school bus, as long as there was extra room and the school buses traveled in that direction.

In September of 1996, the Fourniers were informed that the children would no longer be bused from the school to the church because additional buses were not available to transport the students. J.A. at P94. When Milford discontinued busing the students to the Good News meetings, the Petitioners requested use of the school.

Rev. Fournier testified that the phrase "Good News" has significance in scripture. J.A. at P17. The significance of the phrase "good news" in the title of the club is that "the good news is that Christ, according to the scriptures, died for our sins, was buried and on the third day rose again." J.A. at P18. Rev. Fournier testified that the phrase "good news" in the title of the club was derived from this scriptural reference. J.A. at P18.

Good News is affiliated with a larger parent organization known as Child Evangelism Fellowship Inc. Child Evangelism Fellowship Inc. is a corporation existing under the laws of the State of Michigan. Lodging at DD1. Child Evangelism Fellowship Inc. is an active Christian ministry operating in 142 countries worldwide including the United States. Lodging at DD1. One of the primary ministries worldwide of Good News is the enrollment of children. It boasts more that 100,000 children participate in Good News Clubs worldwide. Lodging at DD1.

Child Evangelism Fellowship Inc. provides teaching materials and training for Good News instructors. J.A. at P13. Child Evangelism Fellowship Inc. is a Christian organization.

J.A. at P17. In addition to providing teaching material and training for the instructors, Child Evangelism Fellowship Inc. also provides religious song sheets and music and copies of the *Daily Bread* booklet (daily Bible readings), for distribution. J.A. at P15. In addition, Child Evangelism Fellowship Inc. provides prayer support and some financial support such as insurance coverage for the local Good News activities. J.A. at P15.

The Petitioners have testified that the true name of the organization with which they have established is the "Evangelism Good News Club."[1] The club has typically been described in that manner by the Petitioners. J.A. at P36. The Petitioners have acknowledged that evangelism means introducing children to Jesus Christ. J.A. at P35.

The Petitioners have admitted that Good News was a religious organization whose activities were religious in nature. J.A. at P50. In this appeal, however, Petitioners attempt to contradict that admission.

Child Evangelism Fellowship Inc. distributes through Good News copies of the *Daily Bread*. Contrary to the assertion at page 8, footnote 1 of the Petitioners' Brief on the Merits, the *Daily Bread* is a devotional booklet containing passages from the Bible, specifically, the New Testament, according to Rev. Fournier. J.A. at P80. Although not used in classes, *per se*, the booklets were distributed to students in the Good News meetings held on school grounds. They were distributed to encourage the students to develop a daily habit of reading the Bible. J.A. at P83. The *Daily Bread* materials supplied were based on the King James version of the Bible. J.A. at P77. The Petitioners have acknowledged that the phrase "daily bread" appears in the Lord's Prayer and has a religious significance. J.A. at P81.

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1. Evangelism is defined as "the preaching or promulgation of the Christian Gospel; the work of an Evangelist." Webster College Dictionary, Random House, Copyright 1991, at 462.

Although the Petitioners allege that Good News was not an exclusive organization, the evidence in this case establishes otherwise. The Petitioners concede in their Brief that Good News' perspective was, in their words, "decidedly Christian." Petitioners' Brief at 9. Petitioners claim, however, that Good News was non-exclusive and open to all children between the ages of 6 and 12. Lodging at AA2. However, contrary to Petitioners' assertion that it was not an exclusive organization, the actual testimony offered by Affidavits from the Petitioners established that the group's meetings were limited, in fact, to only children of the Christian persuasion. Paragraph 11 of the Affidavit of Darlene Fournier in opposition to the motion for summary judgment states as follows:

> GNC does not teach or promote any particular Christian sect's doctrine or theology; there is no instruction concerning the differences of theology among the Catholic sects, among the Protestant sects, or between Catholic and Protestant sect.

Lodging at AA2.

Rev. Stephen Fournier also testified in his Affidavit as follows:

> 38. GNC neither teaches nor promotes any particular Christian sect's doctrine or theology.
>
> 39. There is no instruction covering the differences of theology among the Catholic sects, among the Protestant sects, or between Protestant and Catholic sects.

Petition for Writ of Certiorari at H5.

The above statements establish that the instruction was Christian, although the instruction does not allegedly highlight the differences between Christian religious groups. The Petitioners also acknowledged that children of faiths, other than Christian, did not attend the meetings of Good News. J.A. at P19-P20. Rev. Fournier conceded in his testimony that, for example, no child of Jewish or Moslem faith attended

meetings. J.A. at P20. Good News' obvious and predominant Christian orientation most likely had the effect of discouraging persons of other religious faiths from attending.

In the fall of 1996, Petitioners requested the use of Milford's building for purposes of conducting their meetings. They requested the use of a room in the school on Tuesdays "during the school year." Lodging at W1. Noticeably absent from the request for use was a request for use during the summer, vacation periods or evenings. Lodging at W1. Good News also requested the use of chairs, tables, a television and a VCR. The Petitioners requested these items be provided to them "free of charge." Good News actually met, pursuant to a preliminary order of the District Court, in a school classroom, namely Room 119. J.A. at P30. Room 119 was a special education resource room utilized by Milford. Significantly, Rev. Fournier testified that when he arrived at the room for the meeting, he waited for the students and staff to vacate the room before he began meetings of Good News. Rev. Fournier testified thusly:

> We begin approximately at 3:00, and that depends on when the people are out of the room. We don't get started until the room is clear and we strive to end at 4:00.

J.A. at P29. The evidence established that Good News met at the same time as other official after-school programs occurred. Milford's regular after-school "extra help" sessions, school detention and other official school events occurred at this time, namely 3:00 p.m. It is important to note that district-sponsored extra-curricular and athletic activities also took place during this "after-school" time. Each of these activities were conducted by Milford with paid staff and volunteers

The students who elected to participate in meetings of Good News did so pursuant to a written parental permission slip. Lodging at X2. The written permission slip referred to meetings in Room 119 of Milford on "Tuesdays, 3:00 to 4:00, September through June." Parental permission slips were generally required

to allow students to remain after school to participate in other school-sponsored activities. The announcements about Good News meetings made it clear that Good News promoted itself by advertising that its meetings were in the Milford schoolhouse. Lodging at X2. Thus, Good News was placed on a par with other officially sponsored after-school activities.

The Petitioners contended that their meetings provided the teaching of moral values from a Christian perspective. However, it should be noted that the reference to teaching morals from a Christian perspective *did not* appear in the original building use request form. Lodging at W1. Further, the reference to teaching morals did not first appear until Petitioners raised it in correspondence to Milford following the denial of their application. Lodging at W1.

Rev. Fournier testified as to how the meetings were conducted. His testimony established the overriding religious nature of the instruction he provided. The Good News meetings opened with the Reverend leading the children in prayer of thanksgiving in which they thanked God for allowing them to assemble and asked God to bless the meeting. J.A. at P22. The opening prayer contained references to the Lord Jesus Christ. J.A. at P22. Following the opening prayer, the Good News meeting progressed with a story, usually based upon a Bible verse or Bible story used for the purpose of illustrating the day's lesson. J.A. at P23-P24. The Bible stories were from the Old Testament as well as the New Testament. J.A. at P24. The Bible story was taught from a Christian perspective. For example, the children were taught that morals or values were senseless without Jesus Christ and that for the children who knew Jesus Christ as their Savior, they cannot be jealous because they have the strength of God to assist them in avoiding jealousy. J.A. at P25. Rev. Fournier described the core of the meeting as follows:

> Well, because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these

> values are senseless without Christ, that is to the children who know Christ as Savior, we would say, you know you cannot be jealous because you know you have the strength of God. To the children who do not know Christ, we would say, you need Christ as your Lord and Savior so that you might overcome these, you know, feelings of jealousy or overcome the desire to do bad things to those who somehow hurt you.

J.A. at P25.

In addition to the above, songs of a religious nature were sung (J.A. at P25), such as "You & Me, Jesus died on the Cross for You & Me" (Lodging at BB11), "I Have a Friend and Jesus is his Name" (Lodging at BB47). The songs contained references to the Lord and Savior Jesus Christ as well as references to God.

Verses from the scriptures, particularly the New Testament, were also the focus of Good News meetings. J.A. at P26. Games were also played during the Good News meetings. Those games were related to the particular Bible verse which was taught that day. J.A. at P26. The meetings also consisted of a story concerning missionaries in various foreign countries and spreading the gospel of the Lord Jesus Christ. J.A. at P28. Prizes were awarded to the children who showed knowledge of the day's lesson or the particular Bible verse. The prizes awarded were objects of a religious nature. J.A. at P29.

Rev. Fournier also acknowledged that the meetings of Good News contained occasions when various movies with a religious theme were shown. One movie shown was entitled "Where is God When I'm Scared?." J.A. at P90. The school's equipment was used to present those movies.

Rev. Fournier testified that the meetings of Good News were of a religious nature. J.A. at P51. The Petitioner acknowledged that there was a portion of each meeting of

Good News in which there was a "challenge" and "invitation." Rev. Fournier described this process thusly:

> We would challenge the children. We would basically say, if you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will — we will pray with you separately, individually.

J.A. at P64-P65. Rev. Fournier testified that the challenge and invitation was presented "at the conclusion of the lesson, at the end of the story." J.A. at P65, P72- P73, and P75-P76.

The Petitioners alleged that their organization was comparable to the Boy Scouts, Girl Scouts, 4-H Club and Little League. The evidence established, however, that Good News meetings were qualitatively different from other clubs. The District Court and the Court of Appeals each found a specific religious content to the meetings of Good News, unlike the other groups. Petition for Writ of Certiorari at A16, C23-C31.

Again, contrary to assertions by the Petitioners, the Boy Scouts did not regularly use Milford for weekly or monthly meetings. The Boy Scouts used a part of the school facility for an organizational meeting with leaders workshop which occurred in November of 1996 and January of 1997. J.A. at D2. The Cub Scouts were permitted to use the Milford facilities. J.A. at D2. Unlike Good News, the Boy Scouts and Cub Scouts met in the evenings, usually at 6:00 p.m. or later.[2] Unlike Good News, the compulsory attendance laws did not provide a ready source of students for the Cub Scouts for their meetings. The Cub Scouts relied upon parents to drive those

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2. Although the record does not reflect the precise times for the start and finish of the Boy Scout organizational meeting or Cub Scout regular meetings, the evidence reveals that in the 1996-97 school year those meetings were all held in the evening beginning at 6:00 p.m. or after. Additionally, as Superintendent Peter Livshin advises, beginning in the 1999-2000 school year and thereafter, the Boy Scouts have withdrawn from Milford entirely and no longer use the school buildings.

children back to the schoolhouse to attend the meetings. In the case of Good News, those meetings began at a time when the students were already assembled in the schoolhouse and available to attend those Good News meetings. Good News sought to conduct its meetings as an indistinguishable extension of the school instruction day. Unlike Good News, the Cub Scouts have met throughout the school year, including the summers.

Rev. Fournier and the Petitioners acknowledged that they provided no specific evidence as to any religious or moral instruction provided by the Cub Scouts or Boy Scouts to its members. J.A. at P85. The Petitioners acknowledged, in their testimony, that they had no information as to how the merit badge entitled "God and Country" was earned. J.A. at P86. There was no evidence in the record to establish that any instruction in morals, religion, or Christianity or any other religious practice occurred on the premises of Milford. J.A. at P85-P86.

Rev. Fournier also admitted that he had no information or knowledge as to what specific religious instruction or moral instruction the Girl Scouts provided to their members at Milford. J.A. at P86-P87.

Rev. Fournier also compared his organization to the Little League. He acknowledged that he had no information which indicated that there was any specific instruction in morals or moral values provided by the Little League to its members. J.A. at P87-P88. Further, the record contains no specific evidence as to any instruction in morals or values presented by the Little League. J.A. at P87-P88.

The Petitioners also compared themselves to the 4-H Clubs. The record contains no specific evidence as to any religious or moral instruction given by the 4-H Clubs. J.A. at P88-P89.

The record also contains materials from the teaching manual for the sessions of Good News. In particular, in the Joint Appendix beginning at BB1 is contained a segment entitled "Six flannelgraph lessons from the early life of David for

children ages 5-12." That document entitled "*David, A Man After God's Heart*" was called a biblegram. Page BB5 of the teaching manual described "biblegram basics." This manual provided to the instructor, namely Rev. Fournier, information on teaching the bible lesson.

The manual contained several paragraphs entitled "Presenting the Gospel." This passage was designed to present the gospel for unsaved as well as saved children. The phrase "unsaved child" referred to one who had not yet accepted Jesus Christ as his or her personal Savior. See, "How to Lead a Child to Christ"; Lodging at BB4. Respondents contended that a review of this material beginning at Lodging BB1 through BB70 established that Good News was not instructing children in morality as much as it was providing instruction in the Christian religion emphasizing accepting Christ as a child's personal Savior and directing them along the path of a particular religious and spiritual life.

The meetings of Good News involved religious indoctrination and worship. The club relied upon the presence of students in the school for their increased enrollment at Good News meetings. The meetings were conducted in a regular school district classroom. The meetings were held so closely in time to the end of the school day that the Reverend had to wait until the students and teachers vacated the room before he began his teaching. Rev. Fournier acknowledged that attendance at Good News meetings had more than tripled since the meetings were held inside the school building at the end of the school day pursuant to the preliminary court order of the District Court. J.A. at P12. When the District Court issued the preliminary injunction allowing the Petitioners to use the school building for meetings, the enrollment in Good News rose from 8 (J.A. at P12) children to 28 (Lodging at AA2), an increase of 250%.

It was upon these facts that the lower courts affirmed Milford's action in excluding the Petitioners' activity from the school.

SUMMARY OF ARGUMENT

Milford presents two principle arguments in opposition to the Petitioners' appeal. First, Respondent contends that the Establishment Clause of the First Amendment was violated by the proposed use and the actual use pursuant to the preliminary order of the District Court. The evidence in this case established that the Petitioners engaged in religious worship and instruction when they conducted meetings of Good News. The evidence also established that the Petitioners sought the use of the Milford school building only at times and on occasions when the students were actually assembled. Petitioners sought the use of the school building at 3:00 p.m. on Tuesday afternoons, during the school year. Petitioners limited their request for use of the building to times when the students were already assembled and readily accessible for purposes of solicitation and proselytizing. Respondent submits that it conducted a good faith, thorough investigation of the details of the program offered by Good News and correctly concluded that to permit this club involved Milford in impermissibly endorsing, promoting and aiding a specific religion. *People of the State of Illinois, ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

The second argument advanced by Milford is that in denying access to Good News, it had not engaged in impermissible viewpoint discrimination. The evidence established that there was no group that had been permitted to use Milford's limited open forum for purposes similar to those of Good News. The evidence established that meetings of Good News were qualitatively different from the meetings of other groups permitted to use the school facilities. The meetings of Good News were decidedly religious and specifically Christian in their orientation. No other group, club or activity engaged in any similar conduct. The Respondent contends that it properly and lawfully excluded Good News from the limited open forum in order to ensure that minor children of tender ages between 5 years and 12 years were protected from impermissible adult-led, adult-sponsored religious proselytizing in Milford.

Milford contends it rejected the use of the facility by Good News upon the ground that to permit such use on its premises under these circumstances, would create an unconstitutional establishment of religion. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *People of the State of Illinois, ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

The Respondent urges this Court to affirm the judgment of the court below.

ARGUMENT

I. PETITIONERS' PROPOSED USE OF THE SCHOOL FACILITY, UNDER THE FACTS OF THIS CASE, VIOLATED THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. The Purpose of Petitioners' Proposed Use of the Building Was to Advance Religion.

In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), this Court stated:

> Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over the other. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendance or non-attendance . . . Neither the state nor the federal government can openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Everson, 330 U.S. at 15-16.

We respectfully submit that the Petitioners' use of the school facilities under the conditions described above, constituted a

clear and unmistakable breach of the wall of separation of church and state. Petitioners sought to have Good News, an organization which was unequivocally Christian in its orientation, which unabashedly taught a belief in Jesus Christ, and which taught acceptance of Christ as a personal Savior as the foundation of all morality, to use a school's classroom beginning at 3:00 p.m for such meetings while other District-sponsored after-school activities took place in the same building.

This case involved a circumstance where a "quintessentially religious" presentation occurred immediately upon the conclusion of the regular school day and while the children who had been compelled by law to be there, were still assembled and thus available for solicitation to attend these classes of religious instruction and indoctrination. The classes were run by adults and sponsored by adults. Good News sought to use the school facilities at 3:00 p.m. and only during the school year, because that was where the children were assembled. The Use of Facilities Request Form (Lodging at W1) revealed the true intent of the Petitioners in this matter. The Petitioners sought the use of the school building when school was in session and children were present. Joint Appendix W1 established that the building use request was from 2:30 p.m. to 4:30 p.m. each Tuesday afternoon. Regular classes ended at 2:56 p.m. The request for use was only during the school year. There was no request to use the school building during vacations or summertime. The time of day was selected to be in close proximity to the regular school day. This would allow the Petitioners to take advantage of the fact that the children were required by state law to be present and assembled in the school and thereby more readily available for solicitation and to attend the Good News program.

The evidence established that the Petitioners were taking advantage of the compulsory attendance laws. Membership in Good News consisted of 8 to 10 students while the meetings were held at the Milford Community Bible Church. When the meetings were held in the Milford Central School District

immediately after school, the Petitioners' membership increased to 28 students. This represented an increase of 250% in enrollment. In addition to utilizing a regular school classroom, Room 119, which served as a special education resource room by day, Good News also utilized Milford's television and VCR, chairs, tables, and desks.

As observed by this Court in *People of the State of Illinois, ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948):

> Here not only are the state's tax supported public school buildings used for the dissemination of religious doctrines. The state also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of church and state.

McCollum, 333 U.S. at 465-466.

Milford respectfully submits that there is essentially no qualitative difference between this case and *McCollum, supra*. When Good News was permitted under the District Court's preliminary injunction to use the school building at 3:00 p.m. each Tuesday, there was little question that the state's tax supported public school buildings and the State's compulsory attendance laws were viewed as assisting in the dissemination of religious doctrine. For this reason, the District Court vacated its preliminary injunction and dismissed Petitioners' action. Petition for Writ of Certiorari at C32. Milford respectfully submits that a public schoolhouse full of students attending through the compulsory attendance laws should not be made available to Petitioners for clearly sectarian purposes which are adult-led and adult-sponsored. The public school facilities were used by this sectarian group to promote, encourage and sustain religious teaching.

Milford contends that the true purpose of Good News was revealed in that it sought to use the school facilities only at the times when the children were present in the building at the behest of the state. Good News appeared to be uninterested in the school

building in the evenings, on weekends, during vacations and summers. Good News sought to go where the children were.

The record below established certain essential distinctions from facts which were pertinent to prior holdings of this Court. Good News did not seek the mere use of a public community building, such as the plaintiffs did in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). Unlike the plaintiff in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Petitioners did not merely seek to hold a meeting on school premises. The fundamental distinction between the activities of Good News and plaintiff in *Lamb's Chapel, supra,* and *Widmar, supra* is that Good News sought to utilize the school building only at times when the children were already present and assembled there pursuant to the authority of the state under its compulsory attendance laws. Absent the above, the school building was of no value to the Petitioners. We respectfully submit that the prohibition articulated by this Court in *McCollum, supra,* and *Everson v. Board of Educ.*, 330 U.S. 1 (1947), compels the conclusion that such use would impermissibly involve this school district in approving and sanctioning the establishment of religion or the aid to a specific religion in violation of the Establishment Clause.

B. Good News' Actual Use of the Building Proves the Impermissible Entanglement with and Establishment of Religion.

Respondent had the rather unique circumstance, as presented by the record, of the Petitioners being permitted to use the school building under the District Court's preliminary order. This provided the Respondent with evidence of actual, not intended use. Thus, the court below ruled on a record comprised of evidence from the actual sessions held by Petitioners. The findings of the Circuit Court (Petition for Writ of Certiorari at A16-A17) and the District Court (Petition for Writ of Certiorari at C15-C25) plainly recognized the deeply Christian and religious nature of the presentation offered by the Petitioners in this case. Further, both the District Court and

Circuit Court made specific factual findings that these meetings were religious instruction and worship, not ones dealing with secular subjects such as morality or character education.

The District Court made findings and drew conclusions about the Petitioners' activities. The District Court concluded as follows:

> The Club's activities are characteristic of formal religious instruction, structured in a classroom setting. Each Club has a teacher, uniform lesson plans, and teaching materials . . . That the Club does not promote any one specific denomination or theology within the Christian faith does not make its activities any less religious in nature. Good News' teaching materials and lessons are oriented toward instilling Christian beliefs in the children. To this end, the children pray, read the Bible, memorize biblical verses, and sing songs that have religious references. These activities "clearly denote the organization as a religious club" designed to "instill Christian religion and values" in the children.

Petition for Writ of Certiorari at C23.

The Circuit Court also made similar findings. The Circuit Court concluded:

> We conclude, as did the District Court, that the Good News Club is doing something other than simply teaching moral values. As we stated in *Bronx Household of Faith*, it "is not difficult for school authorities to make" the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer. Although other cases may present difficult questions of line-drawing, we believe that the school authorities, after thorough inquiry and deliberation, correctly

> determined that the activities of the Club fall clearly on the side of religious instruction and prayer.

Petition for Writ of Certiorari at A16.

Respondent submits that Petitioners did not challenge these factual findings. Petitioners have brought forth no argument that these factual determinations were "clearly erroneous" or erroneous in any respect. It appears that Petitioners argue these activities should be permitted because they could be considered instruction in morality.

This was not a case of teaching morality from a Christian perspective. This assertion distorts the facts and misconstrues the evidence in this case. Petitioners attempt by way of a "definitional coup" to change this case from one where there is a clear and present Establishment Clause violation into a "free speech-viewpoint discrimination" case. The Respondent submits that this is not a free speech case. In this case, the Petitioners sought to have the most vulnerable of Milford's elementary age children in public schools attending these club meetings in a classroom only minutes after their regular classroom teacher finished lessons and instruction for the day. At a time when other students were still assembled in other classrooms in the building receiving additional instruction from regular staff members, while practices for school-sponsored athletic endeavors were occurring, and while school-sanctioned, after-school extracurricular activities were occurring, the youngest of the school's children were being indoctrinated into the Christian faith by a reverend of a local Protestant Church. The meetings of Good News were excluded from the forum because of the content of the meetings, not the viewpoint the meetings presented. J.A. at H1-H2. To allow this practice would be to establish a preference for this religion.

Respondent submits that an impressionable 5 or 6 year old student cannot be expected to make the subtle distinction between a reverend who conducts such a "club meeting" and the regular instructors hired by the school district to provide

instruction during the after-school programs or to supervise school-sponsored club meetings at 3:00 p.m. We respectfully submit that students age 5 through 12 cannot be expected to make the subtle distinctions that the Petitioners and the various amici in this case suggest they are able to make. Indeed, this Court observed that assumptions about the ability of students to make these subtle distinctions are less valid for elementary age children who tend to be less informed, more impressionable, and more subject to peer pressure than average adults. *See Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250-251 (1990); *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *see also Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994).

The students who were not Good News members could observe Good News activities by passing in the hallways. The children who passed by and saw others praying or singing hymns could understandably conclude that Milford endorsed and promoted this religion. The record evidence established that the actual use of the building was religious worship and instruction and a violation of the Establishment Clause.

C. Establishment Clause Case Law Compelled the Respondent to Exclude Good News.

This Court has long viewed public schools as a special environment in need of certain protections, including the banning of government initiated prayer therein. In *Engel v. Vitale*, 370 U.S. 421 (1962), the respondent board of education directed the school district's principal to cause the following prayer to be said aloud each day in class: "Almighty God, we acknowledge our dependence upon Thee and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.* at 422. This Court found that the school district violated the Establishment Clause of the First Amendment by requiring the preceding prayer to be recited at the beginning of each school day. *Id.* at 424.

In *Lee v. Weisman*, 505 U.S. 577 (1992), a middle school student objected when the school district invited a member of the clergy to give an invocation and benediction at her middle school graduation. *Id.* at 581. Recognizing, as it has consistently done in the past, that there are heightened concerns with protecting freedom of conscience from subtle, coercive pressure in the elementary and secondary schools and "that prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. This Court found that the school district's actions violated the Establishment Clause of the First Amendment.

This Court has issued a similar holding, even where prayer at non-instructional events is student initiated, student led, non-sectarian and non-proselytizing. In *Sante Fe Independent School Dist. v. Doe, et al.*, 530 U.S. 290 (2000), this Court invalidated two of the school district's policies permitting students to vote to determine whether a student would deliver a prayer at varsity football games and to select which student deliver said prayer.

The courts have also ruled unconstitutional a school policy that permitted the distribution of Gideon Bibles to fifth grade public school students. *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1993). The court there found an Establishment Clause violation in the distribution of the Bibles to students assembled in the school.

We also note that by allowing these "club meetings" to occur on school grounds at the times and places requested by the Petitioners would amount to an "endorsement" of religion. In *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), the court ruled that the term "endorsement" is used interchangeably with "favoritism and promotion." *Id.* at 593. If Milford were ordered to permit use of the school building by Good News, such action would create an "endorsement", "promotion" and favoritism of this religion.

In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), this Court found unconstitutional the practice sanctioned by Pennsylvania law of allowing at least 10 verses

of the Holy Bible to be read without comment at the opening of each school day in the public schools. A child could be excused from the Bible reading or attending such Bible reading upon the request of his parents or guardian. This Court found the practice unconstitutional and in violation of the First Amendment. This Court observed:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect, coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

School Dist. of Abington Township, 374 U.S. at 221 *quoting Engel v. Vitale*, 370 U.S. at 430-431.

This Court further observed:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.

School Dist. of Abington Township, 374 U.S. at 226.

The decision in *School Dist. of Abington Township* is of special interest because counsel for the school district there argued in support of the practice of daily Bible readings by asserting that the school district sought merely to teach morality from a non-religious, non-theological perspective. *See* Transcript of Oral Argument, *School Dist. of Abington Township v. Schempp*, Case No. 142, February 27, 1963, at 3.

The argument advanced by the school district in support of the practice of reading Bible verses to the students each morning was that the school was merely teaching morality from the common source of morality, namely the Bible. Counsel for the petitioner school district, Philip Ward of Philadelphia, Pennsylvania, argued to the Court thusly:

> Gentlemen, that is precisely what we are doing. We are teaching morality without religion, cut adrift from theology. And that is proper for the people of Pennsylvania. We can bring to our children lessons of morality in their school days, as long as we are not bringing religion, not bringing theology. The people of Pennsylvania have wanted to do this, they have since the beginning wanted to bring these lessons in morality to the children. So what do they do? They pick a common source of morality, the Bible.

Transcript of Oral Argument, *School Dist. of Abington Township v. Schempp*, Case No. 142, February 27, 1963, at 3.

In the face of this argument, this Court disagreed and found that the practice of reading Bible verses to children assembled in school to be an unconstitutional establishment of religion in violation of the First Amendment. The Respondent contends that there is no appreciable difference between reading Bible verses during the school day and meetings of Good News at 3:00 p.m., mere minutes after the conclusion of the school day. Respondent argues that constitutional principles regarding the Establishment Clause of the First Amendment, are not so easily and deftly dispensed with as to be determined by the stroke of the clock. Rather, when the totality of the circumstances are examined, as they have been in this case by the lower courts, it is clear that Good News asks the government to lend its tacit support to the propagation of a particular religion as taught by Rev. Fournier in the meetings of Good News.

As Judge Miner observed in the opinion of the United States Court of Appeals for the Second Circuit in this case, the activities

of the Good News Club were "quintessentially religious." Petition for Writ of Certiorari at A17. We respectfully submit that the fundamentally religious nature of this activity is not changed by suggesting that this is "free speech exercised in a limited public forum." Rather, this is instruction in the tenets of a particular religious faith at a time and place when children are still assembled pursuant to the power of the compulsory attendance laws of the state in a classroom owned, operated and supported by the state. This religious indoctrination and inculcation was occurring at a time and a place when the activities of Rev. Fournier were virtually indistinguishable from regular classroom teachers, coaches and other professionals employed by Milford in district-sponsored, after-school activities.

Respondent contends that its action in excluding Good News from the Milford facility was entirely consistent with this Court's various precedents as they relate to the public school environment. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), this Court found unconstitutional a Louisiana creationism statute that forbade the teaching of the theory of evolution in public elementary and secondary schools unless similarly accompanied by instruction in the theory of "creation science." In that case, this Court observed as follows:

> This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 583-584.

Similarly, in *Stone v. Graham*, 449 U.S. 39 (1980), this Court invalidated a requirement for the posting of the Ten

Commandments on public classroom wall. The Court found a violation of the Establishment Clause. Similarly, in *Engel v. Vitale,* 370 U.S. 421 (1962), this Court held that the requirement for the recitation of a "denominationally neutral" prayer was unconstitutional.

The Circuit Courts have been similarly vigilant. For example, in *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1993), the court declared the practice of distributing Gideon Bibles during the regular school day with the permission and consent of the school officials, to be a violation of the Establishment Clause.

In *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), this Court concluded that a nativity scene was impermissible under the Establishment Clause when placed in a public park. In *County of Allegheny, supra,* this Court observed that the Establishment Clause must be applied with special sensitivity in a public school:

> This is not to say that the combined display of a Christmas tree and a Menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. *Cf., Edwards v. Aguillard*, 482 U.S., at 583-584 (Establishment Clause must be applied with special sensitivity in the public school context).

County of Allegheny, 492 U.S. at 620 n.69.

Respondent notes the argument advanced by Petitioners that the children were not required to attend Good News meetings. Petitioners' Brief at 9. Further, Milford's compulsory school day ended at 2:56 p.m. However, the children involved in this program were between the ages of 5 and 12 years. The parents of these children had signed permission slips for them to attend. The children could not leave the building until retrieved by their parents. Thus, as a practical matter, for these young children, their attendance was "compulsory."

Respondent submits that its action in excluding the Petitioners from the utilization of the schoolhouse for the religious instruction and religious indoctrination purposes described above was entirely consistent with and even compelled by this Court's precedents under the Establishment Clause of the First Amendment. Respondent contends that it would be incongruous to prohibit the reading of the Ten Commandments over the loudspeaker, in the morning, while students are assembled but permit the reading of the Ten Commandments to students only minutes after the end of the school day while students are still assembled. Respondent argues that it would be incongruous to prohibit students from receiving religious instruction during the school day but permit the same religious instruction only minutes after the bell rings at the end of the school day while official school-sponsored, after-school activities are occurring. We respectfully submit that the hours of 3:00 p.m. to 4:00 p.m. were a natural extension of the school day which warranted the same protection as the regular school day. Milford perceived that there was no material difference between the circumstances of Rev. Fournier presenting religious lessons and instruction to students duly assembled at 3:00 in the afternoon and those who were sitting in a regular class at 2:30 p.m. If the Ten Commandments cannot be posted in a public school and a crèche cannot be placed on the front lawn of Milford, we contend that religious instruction and religious worship along with religious indoctrination (from whatever perspective) cannot also be permitted in the schoolhouse during the extended school day.

Petitioners have arranged to conduct these religious instruction classes at a time when the Good News program became virtually indistinguishable from other after-school programs sponsored by Milford. We contend that the intersection of religious exercise, religious instruction, and a program that immediately followed the conclusion of the regular school day, while students were still assembled pursuant to the state's authority and its compulsory attendance laws, created a

circumstance which was clearly and unequivocally a violation of the Establishment Clause of the First Amendment. We urge this Court to affirm the Judgment of the court below.

II. RESPONDENT HAS NOT ABRIDGED THE PETITIONERS' RIGHTS UNDER THE FIRST AMENDMENT "FREE SPEECH" CLAUSE.

A. The Respondent Was Entitled to Impose Reasonable Restrictions on the Use of its Limited Public Forum.

In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), this Court recognized that the First Amendment does not guarantee access to property "simply because it is owned or controlled by the government." *Perry*, 460 U.S. at 46. We submit that Milford operated a limited public forum. We contend that Milford had the right, and indeed the obligation, to maintain the integrity of its facilities. As this Court aptly observed in *Perry Education Assn. v. Perry Local Educators' Assn.*:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry Education Assn., 460 U.S. at 49. The forum of Milford exists for purposes of educating the students in the public school district. A public school district must take special care to ensure that its facilities are not used for improper or inappropriate purposes. Milford was obligated to follow New York Education Law § 414. Education Law § 414 only permits certain activities in the schools and if not specifically authorized, the statute

excludes various other activities from the public school. The statute prohibits the public schools from opening its forum to "commercial speech." New York Education Law § 414. The school may not open its forum under state law for purposes of allowing local entrepreneurs to advertise or promote the selling of their wares in the public school setting.

The school is closed to groups which routinely practice exclusion, such as certain exclusive groups and organizations, other than veterans' organizations. New York Education Law §§ 414(c) and (d). In addition, Milford has prohibited political activity from occurring on school premises in accordance with state law. New York Education Law § 414(e). The meeting of a local political party or political caucus would be impermissible in a New York public school district, without voter approval.

Furthermore, the school closed its facilities to impermissible types of expression and behavior such as sexually explicit or morally offensive behavior. J.A. at N19. Milford reserved for itself, the right to close the forum to other activities which would be dangerous or disruptive to the school operation or inconsistent with the school's purpose. J.A. at N19.

The School District had also, in accordance with state law, closed this limited open forum to purely religious instruction and services. New York Education Law § 414. New York State also has a long tradition mandating separation of church and state especially in regard to the operation of its public schools. *See McCollum v. Board of Educ.*, 333 U.S. 203 (1948), concurring opinion Justice Frankfurter, p. 214-215.

This Court has recognized the sensitivity of the environment for elementary age children and the heightened concerns a school district must have for its students. In *Edwards v. Aguillard*, 482 U.S. 578, 583-584 (1987), this Court recognized that elementary age children are entitled to special protection and concern in regard to what is permitted to take place in the school forum. *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 620 n.69 (1989); *see also Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981); *Brown v. Woodland Joint*

Unified School Dist., 27 F.3d 1373 (9th Cir. 1994); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160 (7th Cir. 1993). Further, Congress has established special rules in the "Equal Access Act" to limit religious activities in the public secondary schools to those which are student-led, student initiated and not "directed, controlled, conducted, or regularly attended by non-school persons." This Court has found the Equal Access Act constitutional in *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 236 (1990). The Equal Access Act excluded similar religious expression in the elementary schools. We contend that Congress recognized that very young children cannot discern the differences between state sponsorship and private acts in this context.

The limited open forum must be closely regulated because the forum was designed for the education of our youngest children. The age and relative inability of the elementary school age children to make the subtle distinctions necessary to discern who is or is not an official of the school district for purposes of religious instruction, creates a very rational and, indeed, compelling basis upon which the school district may permissibly act to exclude various expressions.[3] In this case we have adult-led, adult-sponsored religious worship and prayer with the purpose of indoctrination of children into a religious faith. Respondent was entitled to close its forum to this activity.

Milford, like many other school districts in Central New York, had created a limited open forum. As such, it had the right and indeed the obligation to regulate and limit certain expressions of speech in that limited open forum. This Court has recognized that public school boards and administrators must be afforded considerable discretion in operating the

3. We do not concede that Respondent must show a compelling interest in order to exclude religious instruction and religious worship. We note that this Court has not resolved this issue. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 391-392 (1993). We contend that whichever standard is applicable, Milford has met the standard.

school. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). The Respondent's actions were permissible. The limited open forum was properly closed to this religious institution. The Court should affirm.

B. The Limited Open Forum Was Appropriately Closed by Milford.

The parties to this proceeding have stipulated and the Second Circuit has affirmed, that Respondent created a limited public forum, pursuant to New York Education Law § 414. It permitted youth groups such as the Boy Scouts (to a limited extent), the Girl Scouts, the local Little League and 4-H Clubs to use the facilities.

"Limited public forums" are those which have been designated by the government as a "place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). *See also Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997).

This Court has recognized that in the context of a limited open forum a school district or the state may exclude certain subjects. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court observed: "The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the state in reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 515 U.S. at 829. This Court has also observed that the state or a school district may exclude speech where the content of that speech exceeds the lawful boundaries which the state or the school district has set for itself. *See Rosenberger*, 515 U.S. at 829. In this case, we contend that the forum created by Milford was not and had never been open to purely religious instruction, indoctrination and worship. The Petitioners seek to promote the use of adult-led, adult-initiated prayer and worship of a particular religious faith in a

public elementary school. Those who did not accept this religious doctrine were essentially compelled to avoid this program.

The record in this case reflects that Milford consistently excluded certain types of speech, including purely religious worship and proselytizing speech. Rev. Fournier testified that the former superintendent advised him that he had denied previous requests for purely religious uses and, therefore, could not allow Good News its intended use. J.A. at P44. The policy enacted by Milford was consistent with New York Education Law § 414.

The evidence in the record did not establish a single incident or instance at Milford of comparable instruction by any of the groups to which the Petitioners have compared themselves. We note, in particular, that there was no evidence in the record that explains what character education was actually provided by the Boy Scouts or Cub Scouts at Milford. We also note that the record contains references to the fact that the meetings of the Boy Scouts held at the school district were for a limited purpose and on limited occasions. Specifically, the record reflects that only leadership meetings and organizational meetings were held at Milford. Thus, there was no direct evidence that any instruction in "moral education" or in "spiritual development" ever took place on the Milford premises. Further, such instruction, if it even took place on an incidental basis, was vastly different from the religious worship and instruction involved here.

Furthermore, there was no development in the record of precisely what it was that the Cub Scouts did by way of providing "moral education." The only reference to the Cub Scouts having provided any "moral education" was found in the Joint Appendix at Y3 which states that one of the purposes of the Cub Scouts was to "influence a boy's character, development and spiritual growth; develop habits and attitudes of good citizenship, etc." Absent from the record was any specific evidence to demonstrate that the Cub Scouts or the

Boy Scouts engaged in any form of similar religious instruction or worship. The record evidence in this case failed to demonstrate how the Cub Scouts or Boy Scouts conducted their meetings. There was no evidence of what was done at the meetings, and whether any instruction or education in regard to moral, spiritual or similar issues was ever actually presented by such organizations in Milford. On this record, we respectfully submit that there was no instance of any group or club which conducted an activity similar to Petitioners.

We respectfully submit that the Petitioners' "Free Speech - Viewpoint Discrimination" argument must yield to the overriding Establishment Clause concerns presented here and the lack of evidence of discrimination by Respondent. *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1993). The Court in *Berger* observed:

> Defendant is also wrong as a matter of law that the First Amendment interest in free expression automatically trumps the First Amendment prohibition on state sponsored religious activity. The reverse is true in the coercive context of public schools.

Berger, 982 F.2d at 1168. We categorically deny the claim that the Respondent had engaged in "prohibited viewpoint discrimination." Milford had not discriminated against the Petitioners on the basis of Petitioners' viewpoint. Milford had rejected the Petitioners' use of the school building for the simple reason that the Petitioners sought to engage in religious instruction and religious indoctrination on school premises immediately at the end of the school day. We contend that this result was not only permissible, it was required.

> The principle that government may accommodate the free exercise of religion does not supercede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that

> government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Lee v. Weisman, 505 U.S. 577, 587 (1992).

We also note and strenuously oppose the argument advanced by the Petitioners that Milford would exclude all activity by Good News. See, Petitioners' Brief at 13. Such a suggestion is contrary to the record evidence. In the Joint Appendix at H1-H2, the Superintendent of Schools acknowledged this Court's decision in *Lamb's Chapel* and stated uses consistent with that decision would be permitted. However, the Superintendent, after a detailed review of Petitioners' program concluded that its program was the equivalent of religious worship (J.A. at H1-H2) and denied the request.

The decision to deny access to Good News was based upon a well-founded belief that Good News was engaging in the practice of religion and religious indoctrination in the school through an adult-led and adult-initiated program. The basis for this exclusion was approved by the lowers courts in this case.

Milford maintains that its decision to exclude was based solely upon its investigation of the activities of Good News and its determination that Good News was engaged in religious instruction and religious indoctrination in the school. The record established that the decision of Milford was based entirely upon consideration of the content of the speech, not its viewpoint. The limited open forum was properly closed to this program of adult-led, adult-initiated proselytizing of Milford's most vulnerable students.

C. Milford Did Not Become Excessively Entangled with Religion When it Inquired into Good News' Intended Use.

We note that the Petitioners and several of the amici make the argument that the Respondent cannot separate religious instruction and religious services from a secular activity carried

out from a religious viewpoint. Petitioners' Brief at 22-26. We disagree and respectfully submit that if this argument were accepted then all religious activity must be permitted at any time in the schoolhouse. As discussed in Point I above dealing with the Establishment Clause, the issue of presenting religious material from a non-sectarian point of view or a non-theological point of view was rejected in *School Dist. of Abington Township v. Schempp, supra*. We respectfully submit that the argument that offering up this religious instruction and indoctrination as nothing more than "teaching morals from a Christian perspective" is to ignore the stark reality of the facts of this case. The Petitioners have engaged in, and have actively pursued, an agenda of religious instruction and religious indoctrination. This was not changed by the Petitioners' facile characterization of its intent. An investigation of the purpose of Good News' intended use of the school revealed the plainly religious purpose of the Petitioners' request.

This Court has often recognized that drawing the lines of distinction in Establishment Clause cases is not a precise science. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clause is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz, supra*, at 668. The line between permissible relationships and those barred by the clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch, 465 U.S. at 678-679.

We contend that it is not a difficult task for school districts to determine whether a certain activity is "quintessentially religious." Nor does such an inquiry "entangle" the Respondent with the religion of the Petitioners. Such line drawing does not involve the school district or the courts in impermissible intrusion into religious activity nor does it entangle the school district with religion to make such determinations. The school district is responsible to examine and oversee what takes place in its school buildings, both before, during and after the school day. For example, this Court has held that school officials must make "certain that . . . subsidized teachers do not inculcate religion." *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). Schools are required to make these determinations and have done so often. *Marchi v. Board of Co-op. Educational Services*, 173 F.3d 469, 475 (2d Cir. 1999) where the Court prohibited a teacher from instructing in religious matters. *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517 (9th Cir. 1994) where a school district properly prohibited a teacher from discussing his religious believes with students during the school day on school grounds. *Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996) where the Court ruled that a school district correctly removed a substitute teacher because of his efforts to teach religion in the school during the day. *See also Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990); *Webster v. New Lenox School Dist.*, 917 F.2d 1004 (7th Cir. 1990).

Milford was obligated to proceed with "heightened concern" for protecting the freedom of conscience of the students in its district from subtle and coercive pressure. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992). This Milford attempted to do by asking for information from Good News that was no different than what was requested from others who sought use of the building.

Contrary to assertions by Petitioners, there were no probing questions asked of any member of Petitioners' Club. Petitioners' Brief at 25. Those inquiries only occurred *after* the litigation

was commenced and during an Examination Before Trial. The process which Respondents followed consisted of an examination of the materials to be used in the program and an analysis of the Petitioners' own description of the event on a standard form. J.A. at W1. This inquiry represented a non-discriminatory examination of the purpose of the request for use of the building; similar to that of every other user.

The Respondent made a reasoned and careful judgment regarding the Petitioners' requested use of the building. Respondent followed the same procedure in regard to Petitioners' application as it did with all others. Respondent did not become unduly entangled with Petitioners' religious practices.

D. The Impressionability of the Young Students in this Case Has Been Recognized by the Court.

Respondent also rejects the argument that the impressionability of elementary age students, ages 5 to 12, is something which must be proven by evidence in the record. Amicus Brief of Laycock at 5. We respectfully submit that such an assertion is without foundation. This Court and numerous other courts have recognized and taken notice of the impressionability of young students in elementary and secondary public schools. *See Lee v. Weisman, supra*; *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Edwards v. Aguillard*, 428 U.S. 578 (1987); *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

As this Court observed in *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985):

> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this

> kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. *Cf. Widmar v. Vincent, supra,* at 274, 102 S.Ct., at 276; *Tilton v. Richardson,* 403 U.S. 672, 685-686, 91 S.Ct. 2091, 2099, 29 L.Ed.2d 790 (1971). The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

School Dist. of the City of Grand Rapids, 473 U.S. at 390.

Congress has also recognized the vulnerability and impressionability of elementary age children. It specifically excluded elementary age children from coverage under the Equal Access Act because of fear expressed by various members that such children would be unable to distinguish school sponsored prayer and speech from private speech. 20 U.S.C. §§ 4017-4074; *see also* S. Rep. No. 98-357 at 43-49 (1984), *as reported in* 1984 U.S.C.C.A.N. 2348, 2389-94.

Respondent respectfully submits that it acted properly when it rejected the Good News application based upon its policy determination that to allow religious instruction in the schools would be inappropriate and would expand the forum. The impressionability of these students has been recognized by this Court. There was no need for Milford to separately prove the impressionability of elementary age students. Milford was required to take special care to insulate these students from the adult-led proselytizing of the Petitioners. The decision of the court below should be affirmed.

E. The Cases of *Lamb's Chapel*, *Widmar* and *Rosenberg* Do Not Support Petitioners' Arguments.

The Petitioners have written extensively in regard to comparing this case to *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454

U.S. 263 (1981) and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). We respectfully submit that these cases are inapposite to the present circumstance.

In *Lamb's Chapel v. Center Moriches Union Free School Dist., supra,* the majority of this Court ruled that it was not considering, and did not consider, the issue of religious instruction or Sunday school in a public school in its decision. At footnote 2 of the Majority Opinion, at 389, this Court observed as follows:

> Shortly before the first of these requests, the Church had applied for permission to use school rooms for its Sunday morning services and for Sunday school. The hours specified were 9 a.m. to 1 p.m and the time period one year beginning in the next month. 959 F.2d 381, 383 (CA2 1992). Within a few days, the district wrote petitioner that the application "requesting use of the high school for your Sunday services" was denied, citing both New York Education Law § 414 and the district's Rule 7 barring uses for religious purposes. ***The Church did not challenge this denial in the courts and the validity of this denial is not before us.***

Lamb's Chapel, 508 U.S. at 389 n.2 (Emphasis supplied).

We respectfully submit that the issue in the instant case is the issue identified in Footnote 2 and which this Court did not address in *Lamb's Chapel, supra.* We respectfully submit that the issue before this Court is whether a Sunday school type program, replete with religious instruction and religious indoctrination is permissible in a public school setting. We respectfully submit that under the established facts of this case Good News' activity was impermissible and violated the Establishment Clause.

The facts of this case established that Milford was not dealing with a secular activity presented from a Christian

perspective. *See* Decision of District Court which distinguished *Lamb's Chapel*, Petition for Writ of Certiorari at C29-C30. The District was faced with activity which paralleled a religious worship service and constituted religious instruction. As described by the court below, this activity was "quintessentially religious." *Good News Club v. Milford Cent. School*, 202 F.3d 502, 510 (2000). There was little doubt that the activities engaged in by Rev. Fournier in the meetings of Good News were decidedly religious in nature. Although Good News sought to defend its activities on the ground that it endeavored to teach morality from a Christian perspective, Good News did little more than to change terminology without affecting the content of their message. This definitional coup must fail.

Good News seeks by an alteration of language to change this case into something it is not. Good News seeks by verbal sleight of hand to change religious instruction and religious worship into morality and character education. Although religious instruction may have its moral benefits and may be beneficial to the students' character development, it nonetheless remains purely religious instruction and indoctrination.

The logical extension of Petitioners' argument that its activity is protected speech from a religious viewpoint would be that the Establishment Clause be overruled by the Free Speech Viewpoint Discrimination Doctrine. This would be a result at odds with long standing First Amendment Law. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Berger v. Rensselaer Cent. School Corp.*, 982 F.2d 1160, 1168 (7th Cir. 1993).

Milford contends that *Lamb's Chapel* is not dispositive of this case. Although *Lamb's Chapel* may provide guidance to schools in viewpoint discrimination cases, this case is purely an Establishment Clause case in which a religious club sought to engage in purely religious worship and instruction under the guise of a free speech argument. By contrast, *Lamb's Chapel*

also involved an evening program for adults concerning a secular subject.

Widmar v. Vincent, 454 U.S. 263 (1981), also is not controlling in this case. In *Widmar*, the University denied permission to a group known as "Cornerstone" which sought to hold its meetings in classrooms or in the student center. The meetings were open to the public and attracted approximately 125 students. The typical Cornerstone meeting included prayer, hymns, bible commentary, and a discussion of religious views and experiences. It is significant that this activity was entirely student led and student driven. Second, it was conducted on a college campus where young adults, rather than children of tender years, were present. In *Widmar*, *supra*, the majority of this Court observed as follows:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

Widmar, 454 U.S. at 274 n.14. Thus, the Court's opinion distinguishes *Widmar* from the facts involved in the Good News activity. In Good News, we were dealing with the youngest children registered in a public school. Unlike *Widmar*, we are not dealing with mature young adults expressing themselves in the marketplace of ideas.

Respondent argues that there is simply no comparison between dealing with well-educated adults in a college setting who gather together for purposes of some religious prayer and the gathering of elementary age students for religious indoctrination conducted by a frocked minister of an established church, while the students are still assembled through the means of compulsory attendance laws.

Respondent also notes that in *Widmar, supra,* this Court held that the University had created an open or public forum. This, of course, was unlike the situation at Milford where the school established a limited public forum only. Since the University in *Widmar* could show no compelling reason for closing the

forum to this religious activity, the Court found a constitutional violation in the exclusion of that activity. In this case, Milford had a limited open forum in which no similar activity had ever been demonstrated and where compelling reasons have been shown for closing the forum to the Petitioners' requested use.

In *Widmar v. Vincent, supra*, this Court observed:

> But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

Widmar, 454 U.S. at 273.

Unlike *Widmar*, the benefits to the Good News Club from the use of the classroom, immediately after school, were not incidental. Benefits to Good News were significant. Good News had ready access to a group of very young, public school children for purposes of proselytizing. The evidence established that the state's compulsory attendance laws were utilized to support Good News and its religious activities. This conclusion was supported by the fact that Good News' attendance had increased from 8 to 28 by moving from its church to the Milford public school. Milford contends that this was not incidental assistance to Good News and its religious pursuits. Milford urges that this was the very type of unconstitutional assistance which the First Amendment Establishment Clause prohibited.

The Petitioners have also placed heavy reliance upon the case of *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). *Rosenberger* is likewise inapposite. *Rosenberger* involved a university setting. There were mature young adults in a college setting who were enmeshed in a vibrant marketplace of ideas. Students in *Rosenberger* established a student newspaper called "Wide Awake" which received funding from the University as did numerous other student activities and student run newspapers. The University's objection to this particular newspaper was found in the fact that it was published from a

religious and Christian perspective. The Court found that the refusal to fund "Wide Awake" amounted to unconstitutional viewpoint discrimination.

Rosenberger is markedly different from the present case. First, *Rosenberger* involved a college setting versus Milford's elementary school setting. There is a world of difference between the maturity and intellectual development of college students versus students, ages 5 to 12.

In Milford, there was no similar activity permitted or conducted in the school district which was similar to or which paralleled the religious instruction and religious indoctrination offered by the Petitioners. Milford established that there was no record evidence that substantiated a comparison between the activities described in the record of the Boy Scouts, Cub Scouts, Girl Scouts, 4-H Clubs or Little League which could be said to compare to that of the Petitioners. Further, there was no evidence that the school permitted any other religious, atheistic or similar presentation to occur in Milford. *Rosenberger* dealt with the issue of viewpoint discrimination while the present case deals with an Establishment Clause issue. The two are substantively distinct. *Rosenberger* is, therefore, inapposite.

F. Milford Was Not Hostile to Religion When It Excluded Petitioners' Request for Use of the Building.

When Milford rejected the Petitioners' application for use of its building, it was applying established law. As set forth in detail above, it would be impermissible to allow Good News to conduct its religious instruction, religious indoctrination and religious worship on the premises of Milford. The group of students involved were the youngest and more vulnerable in the school district. To permit this religious group into the school to conduct its religious exercise would be potentially divisive within the small community of Milford, New York. Maintaining government neutrality toward religion is not hostility toward religion. The enmeshing of government with religion harms both government and religion.

The answer to the argument by Petitioners that the Respondent was hostile to religion is found in the following passage from *McCollum, supra,* by Mr. Justice Black:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.

McCollum, 333 U.S. at 211-212.

For the foregoing reasons, Respondent respectfully urges the Court to affirm the Judgment of the court below.

CONCLUSION

In the fall of 1996, Rev. Stephen Fournier and his wife, Darlene, requested the use of the Milford Central School District for meetings of its club known as the "Evangelism Good News Club." The Good News Club intended to meet on Tuesdays, immediately after school. The School Superintendent conducted an appropriate inquiry into what the Good News Club proposed to do inside the school building on Tuesday afternoons. After reviewing the materials submitted by Good News and examining the content of its application for building use, the Superintendent concluded that its services were the equivalent of religious instruction and religious worship. Milford determined that it was obligated, under law, to deny access to Good News for the program of religious instruction and religious worship, it offered.

The Respondent had not engaged in impermissible viewpoint discrimination. Milford has protected its youngest children from adult-led, adult-sponsored, sectarian proselytizing by limiting its forum as it is required by law to do.

The District Court, upon the submission of a complete record, concluded that Good News was engaged in religious worship and religious instruction. The United States Court of Appeals for the Second Circuit affirmed that finding and further concluded that the activities of Good News were "quintessentially religious." In order to preserve the wall of separation between church and state, Respondent urges this Court to affirm the judgment of the court below.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

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REPLY BRIEF

I. MILFORD'S EXCLUSION OF THE CLUB FROM ITS FORUM WAS NOT VIEWPOINT NEUTRAL.

Milford has opened up its facilities after school to community groups for extremely broad purposes. Pet. Appx. D. In particular, Milford allows community groups to use its facilities for purposes pertaining to "the welfare of the community" and for the promotion of the moral and spiritual development of children. J.A. at N10-11, O8, Pet. Appx. D1, Brief of Milford (2nd Cir.) at 9.

The Good News Club ("Club") is a private community group that applied to use school facilities. [Lodging at W1]. Milford censored the Club's speech from its forum only because the speech was too religious. J.A. at G4(¶13), G6(¶18), N16-8, P47, V1 H1-2. The Second Circuit affirmed Milford's censorship on the theory that the Club's speech, by urging children to have faith in God, left the permissible realm of secular morality and entered the forbidden world of religion. Pet. Appx. A15-6.

The Second Circuit's decision was flawed because it literally ignored this Court's controlling precedent on viewpoint discrimination.[1] The law applicable to this case is well-traveled ground. This case involves the application of virtually the same policy held unconstitutional in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and virtually the same constitutionally protected religious viewpoint as in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

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[1] The Second Circuit's opinion below did not cite *Lamb's Chapel* or *Widmar*, and mentioned *Rosenberger* once only in passing.

Moreover, Milford offers the same defense to justify its unconstitutional policy and viewpoint discrimination – a distinction between constitutionally protected singing, teaching, and reading and unprotected worship - that this Court found unworkable and unconstitutional in *Widmar v. Vincent*, 454 U.S. 263 (1981).

Milford has adopted an extremely broad community use policy similar to that at issue in *Lamb's Chapel*. The policy opens facilities to the public, "for the purpose of instruction in any branch of education, learning or the arts" and "for holding social, civic and recreational meetings and entertainment events" and "other uses pertaining to the welfare of the community." Pet. Appx. D1. Milford's policy, however, closes the facilities to otherwise eligible users who have a "religious purpose," (Pet. Appx. D2), a policy identical in all respects to that invalidated in *Lamb's Chapel*. *Compare Good News Club*, 202 F.3d at 504 *with Lamb's Chapel*, 508 U.S. at 387.

The Club has adopted essentially the same perspective as the student newspaper adopted in *Rosenberger* - that faith in God is necessary to have the strength to live a moral life.[2] The Club offers its members the same solution to deal with feelings of anger and jealousy as the student newspaper did – faith in God. Discriminating against the Club's perspective is no more constitutional now than it was in *Rosenberger*.

Finally, Milford adopts essentially the same unconstitutional framework to justify its discrimination against religious speakers that this Court rejected in *Widmar*. Milford

[2] The purpose of *Wide Awake* (the newspaper in *Rosenberger*) was "to challenge Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means." *Id.* at 826. *Wide Awake* urged students to seek God's help, for example, to overcome eating disorders and racism. *Id.* at 866-67 (dissent).

proposes that government officials scrutinize the significance of religious speech and then make essentially theological classifications as to whether that speech constitutes religion, worship, or instruction. Such classifications are unworkable and unconstitutional. *See* Brief of Douglas Laycock at 14-18 (arguing that a distinction between religion as viewpoint on morality and religious instruction is "untenable and readily subject to abuse"); Brief for the States of Alabama *et. al.*, at 16-18 (arguing that it is unconstitutional for state officials to distinguish constitutionally protected singing, teaching, and reading from unprotected worship). *See also* Brief for 20 Theologians and Scholars of Religion (surveying various religious traditions rejecting the coherence of distinguishing "religious instruction" from "moral instruction from a religious perspective"). This Court has already rejected Milford's framework, warning that inquiries into the significance of religious words and practices tend inevitably to entangle the state with religion in a manner forbidden by the Constitution. *Widmar*, 454 U.S. at 269-70. *Accord Rosenberger*, 515 U.S. at 844 (scrutinizing the content of speech lest it contain too great a religious content is inconsistent with the Establishment Clause).

Milford would distinguish *Lamb's Chapel* and *Rosenberger* in three ways, none persuasively. *First,* Milford notices that the age of the audience in *Rosenberger* and this case are different. True, but audience identity is unrelated to the question of whether the government discriminates against a speaker's viewpoint.

Second, Milford argues it has never actually had a religious or atheistic presentation in its forum. A forum, however, is defined by its policy as well as practice, and Milford's policy excludes religious speakers, but not atheistic speakers. By never allowing a "religious presentation" in its forum, Milford only proves that its discrimination is consistent,

not that its discrimination is constitutional.

Third, Milford's labeling of the Club's speech as religious instruction begs the question whether Milford discriminates against the Club because of its viewpoint. The issue is whether Club meetings, however one labels the speech, offer a perspective on how to promote the welfare of the community, or a perspective on how to influence a child's spiritual development, or perspective on how to promote morals of children.[3]

Recognizing no escape from this Court's viewpoint discrimination precedents, Milford claims that viewpoint discrimination is no longer at issue in this case: "Milford contends that *Lamb's Chapel* is not dispositive of this case. Although *Lamb's Chapel* may provide guidance to schools in viewpoint discrimination cases, this case is purely an Establishment Clause case." Brief of Respondent's ("RB") at 38 (emphasis added). See also RB at 41 ("Rosenberger dealt with the issue of viewpoint discrimination while the present case deals with an Establishment Clause issue").

II. MILFORD'S STATEMENT OF FACTS IS INACCURATE.

Through almost four years of litigation, this case has focused almost exclusively on viewpoint discrimination under the Free Speech Clause. Now, suddenly, Milford shifts focus

[3] Milford never attempts to address petitioners' argument that a regime that prohibits religious instruction, but allows "secular moral" instruction, inherently discriminates against the religious viewpoint. See Brief for Petitioners' at 26-7; Brief of 20 Theologians and Scholars of Religion at 7-11 (explaining that when the government allows "secular" moral instruction but excludes religious instruction from its forum, it "tak[es] side in a long-standing theological and philosophical controversy.").

and claims that discrimination against the Club's speech is compelled by the Establishment Clause.[4] To support its new strategy, respondent and particularly its *amici* present to the Court "facts" not contained in the record; indeed, the record directly contradicts some of these facts. Petitioners, therefore, will correct the factual record before addressing respondent's legal arguments.

A. Milford's Facilities Are Open to the Community After School at 3:00 p.m.

Several of the respondent's amici claim that Milford's facilities were not opened for community use until several hours after the end of the school day. The amici are wrong. The simple, undisputed fact, repeatedly conceded by Milford, is that "at all relevant times" (i.e, including precisely the time at which the Club wanted to meet) Milford's policy was in full effect and its facilities were "a limited public forum." See Brief of Milford (2nd Cir.) at 14, 9.

The issue in this case is not what time the Club can use Milford facilities, but whether the Club can use the facilities at all. Milford has explained to this Court that "its decision to exclude was ***based solely upon*** . . . [the fact] that Good News was engaged in religious instruction." RB at 32. See *Good News Club*, 202 F.3d at 509 n. 8, (Pet. Appx. A14). Milford

[4] In the Courts below, Milford never even cited the Establishment Clause cases that it now finds dispositive, namely *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), *Everson v. Board of Educ.*, 330 U.S. 1 (1948), *School Dist. of Abington v. Schemmp*, 374 U.S. 203 (1963), *Lee v. Weisman*, 505 U.S. 577 (1992), or *Stone v. Graham*, 449 U.S. 39 (1980). Nor did Milford claim that the District Court's preliminary injunction allowing the Club to use school facilities was forcing Milford to violate the Constitution. Milford neither asked for a stay of nor appealed the preliminary injunction. Moreover, Milford did not close, or otherwise modify, the forum pending the outcome of the case so as to ameliorate any supposed Establishment Clause concerns.

declares that its "limited open forum [sic] was properly closed to [the Club's] program." RB at 32 (emphasis added). Milford would let the Club use the school at 3:00 p.m. if its speech were less religious. [G4(¶13), N16, N18, P47, V1, H1-2, G6(¶18)]. The sole basis for excluding the Club was not the time of its meetings, but that the Club's speech was too religious. See RB at 16 (objecting to the "deeply Christian and religious nature of the presentation").[5]

B. The Club Does Not Solicit Students While at Milford.

For the first time in this litigation, Milford claims that the Club seeks access to school facilities to solicit students to join the Club. This is not true. There is no evidence whatsoever that petitioners have ever used school facilities at any time for the purpose of soliciting students to attend Club meetings. The only students attending Club meetings are those sent there by their parents. See JA at E2(¶6).

Milford mischaracterizes the record to infer that the Club must have been seeking to solicit students because "[w]hen the District Court issued the preliminary injunction allowing the Petitioners to use the school building for meetings, the enrollment in Good News rose from 8 children to 28, an increase of 250%." RB at 11. The record does not support Milford's inference. The initial application for the Club to use Milford's facilities in 1996 indicated that the Club's membership was 20, not 8. Lodging at W1. When petitioners

[5]An *amicus* suggests that Milford's counsel chose not litigate the issue of what time the forum opened. Such a statement lacks a basic understanding of the facts. If the facilities were closed to the community at 3:00 p.m., Milford could have told the Club it could not meet then. The concession that the forum was open at 3:00 p.m. was not an oversight, but a reflection of reality. Although Milford now for the first time alleges that the Cub Scouts use the facilities at 6:00 p.m. Milford does not now argue, imply, or suggest that the Daisy Scouts, the, and the 4-H club at 3:00 p.m. RB at 29.

moved for a preliminary injunction, Darleen Fournier testified that the membership of the Club was 28, not 8. Lodging at AA2(¶8). Contrary to respondent's assertion, the Club's membership did not increase 250% during the year and a half it met at the school.[6]

Respondent imputes to the Club a sinister motive to meet at the end of the school day. Respondent conveniently ignores the fact that prior to making any application to use Milford's facilities, the Club met for a year and a half at 3:30 p.m. in a different location. JA at L1(¶4), P92-3, X1. The children were bused after school from Milford to the meeting site. JA at L1(¶5), P93. The Club had **no** desire to use the school facilities at all until the busing was stopped. JA at L1(¶7), P92, P31.

Meeting at 3:00 p.m. is not designed to recruit children into the Club, but for the convenience of parents. JA at P100-01. In a society ever pressed for time, parents find it difficult to make multiple trips to and from a location. If the Club met at 6:00 p.m. parents would be forced into the unenviable and wearying task of repeatedly transporting children. The Good News Club, like the 4-H club, the Junior Girl Scouts and the Daisy Scouts, wanted to use Milford's facilities at the conclusion of the school day.

C. The Record Does Not Support Milford's Claim that Elementary Students Remain After School to Participate in School-Sponsored Activities.

Milford describes 3:00 p.m. as the "finish" and "conclusion of the school day." RB at 2, 14, 18. Milford also

[6] The figure "8 to 10" was a "guess" offered by Steve Fournier after he repeatedly testified he was not involved and did not know the membership of the Club when the meetings were held at the church. JA at P12, P92-3.

states that "students remain after school to participate in school-sponsored activities." RB at 6-7. There is not a scrap of evidence to be found in the record that any school-sponsored activities for grade school children occur after "the conclusion of the school day." Milford has offered no such proof. Milford never represented, in its stipulation of facts, in arguments or briefs to the District Court or the Second Circuit, or to this Court in its opposition to certiorari, that elementary school children participate in any school-sponsored activities after the conclusion of the school day.

D. Room 119 is Not an Elementary Classroom.

Respondent artfully colors its statement of the facts to imply that Room 119 (where the Club met) is an elementary classroom. It is not. JA at N12. Room 119 is a combination high school resource room and junior high school special education room. Id.[7] It is fiction to suggest that elementary education was being conducted when the Club arrived to use the high school resource room.[8]

At Milford, just like countless other schools around the country, when the school bell rings to end the day, the elementary children make haste for the exits. Instead of racing to their buses, Good News Club members from various grades

[7] Milford, not the Club, chose Room 119 for the Club meetings. The Club had requested the cafeteria. W1; JA at O11 (District Court ordered Milford to allow Club to use "cafeteria pending the final resolution of this case").

[8] Respondent states that the Club had to wait until "**students**" vacated Room 119 before the Club meeting started. RB at 6. The record does not support that assertion. Steve Fournier testified that he had to wait for "people" (not students) to leave the resource room before the Club meeting started. JA at P29.

walk through the halls of Milford Central to a high school resource room for their Club meetings.[9]

Respondent and its amici also assert that Club meetings are conducted like a class. They are not. The Club is a fun time with children from different age groups and grade levels. AA2(¶9). Moreover, children during a Club meeting are free not to participate in an activity and children at times actually do choose to abstain. JA at P21. Presumably students at Milford are not at liberty to choose in which part of a school class they will participate. Further, there is nothing in the record that the Club gives homework assignments. The record does not support the notion that Club meetings mimic a school classroom.

III. MILFORD HAS THE BURDEN OF PROOF.

Milford had the burden of proving a sufficiently compelling state interest to justify censorship of the Club's speech from its extremely broad "limited" public forum. "When First Amendment compliance is the point to be proved, the risk of non-persuasion--operative in all trials--must rest with the Government, not with the citizen. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entertainment Group*, 120 S. Ct. 1878, 1888 (2000). *See Greater New Orleans Broadcasting Ass'n., Inc.* v. *United States*, 527 U.S. 173, 183 (1999) (State bears burden of justifying its restrictions on speech).

Milford raised the Establishment Clause as a defense in its answer to petitioners' complaint. JA at D4. Respondent built

[9] One of respondent's amici asserted that students are escorted by their teachers to Club meetings. There is absolutely nothing in the record remotely suggesting that a teacher ever escorted a student to Club meetings.

its record and evidence during the almost two years of litigation in District Court that involved extensive discovery. Upon completion of discovery, the parties cross-moved for summary judgment, stipulated to the facts and waived a trial. JA at B7-10. Milford had the responsibility to identify all material facts supporting any affirmative Establishment Clause defense it wished to raise in opposition to the Club's motion for summary judgment. See *Playboy*, 120 S. Ct. at 1892-93. See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986) ("Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); *id.* at 323-24 ("one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses").

Milford has not met its burden to show a compelling state interest in censoring the Club's speech from its extremely broad "limited" public forum. Milford and its *amici* have imagined and created facts not in the record to prop up a newly adopted Establishment Clause theory. Any case on appeal could be made stronger or changed to fit a new legal theory with "would of," "should of," and "could of." That, however, is not our system. As discussed below, respondent has not met its burden and has demonstrated neither that the Establishment Clause requires censorship of the Club's speech nor that censorship is the least restrictive means to comply with an alleged Establishment Clause violation.

IV. MILFORD HAS NOT DEMONSTRATED THAT THE ESTABLISHMENT CLAUSE REQUIRES CENSORSHIP OF THE CLUB'S SPEECH.

Milford's theory that the Establishment Clause requires it to censor completely the Club's speech from its facilities has

radical implications. Milford urges the Court to reverse the long held proposition "that the Establishment Clause [does not] justif[y], much less require[], a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. at 839. Milford urges that the Establishment Clause, which was crafted to defend the rights of the religious from exclusion from the community, be used as a weapon to exclude religious speakers from participation in a community forum. Milford urges that a child's potential mistaken perception of government endorsement mandates government censorship of constitutionally protected speech. In sum, Milford urges that the endorsement test, a delicate tool forged to promote inclusiveness, communication, and education, be converted into a blunt instrument for exclusion, censorship, and ignorance. Petitioners urge the Court to reject such a radical and unprecedented interpretation of the Establishment Clause and the endorsement test.[10]

A.

"The Establishment Clause prohibits government from appearing to take a position on questions of religious beliefs or from making adherence to religion relevant in any way to a person's standing in the political community." *Capitol Square Review Board v. Pinette*, 515 U.S. 753, 783 (1995) (internal quotation marks and citation omitted) (O'Connor, J., concurring). Based on this principle, Justice O'Connor has defined the observer under the endorsement test in the following manner:

---

[10] *See generally* Brief of Douglas Laycock at 2, 9-11. Professor Laycock observes that the Court "has *never* held, in *any* context, that government may or must discriminate against a private speaker based on the religious content of his speech." *Id.* at 2-3 (emphasis in original).

> Because our concern is with the political community writ large, the endorsement inquiry is *not about the perception of particular individuals* or saving isolated adherents from discomfort. ... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech] takes places.

Id., at 779-80 (emphasis added).

A reasonable observer (aware of the history and context of the Milford forum and the community) would know that when the school bell rings at 2:56 p.m., school is over and the children are dismissed. RB at 2,14. A reasonable observer would know that the Milford school board has decided voluntarily to open the doors of its facilities to private community groups on a neutral basis at the "conclusion of the school day," (Pet. Appx. D), that private youth groups are allowed to use Milford's facilities "to influence the spiritual development of children," (JA at N10-11, O8, Pet. Appx. E4(¶23), Lodging at Y1,2(¶4),3), that a number of private community youth groups actually use the facilities "to promote the moral and character development of children," (JA at O6,8, Brief of Milford (2nd Cir.) at 9, Pet. Appx. E4(¶ 21-3), Lodging at Y1,2(¶ 4),3 Z1-3, AA3(¶ 17),5), and that other youth groups would be permitted to use the facilities upon request (JA at O8, Brief of Milford (2nd Cir.) at 9). A reasonable observer would also know that Milford's community use policy opens its forum for "the purpose of instruction in any branch of education, learning or the arts," and "for holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." Pet. Appx. D. A reasonable observer would know that Milford has an application process and that the Club went through the process without the benefit of any preferential treatment. JA at P94-7, Lodging at W1.

A reasonable observer would know that just like countless other schools around the country, when the school bell rings to end the day, the elementary children make haste to the bus home and that, instead of racing to their bus, Club members go to a high school resource room (not an elementary classroom) for their meeting. JA at N12. A reasonable observer would know that neither teachers nor administrators in any way promote, publicize, distribute information about, or otherwise are involved in aiding or assisting the Club. JA at L2(¶9-10). A reasonable observer would know that because of the time and the location of the meeting (behind closed doors of a high school resource room), it is no more than a remote possibility that any other elementary students would see or hear what occurs in the Club. JA at O10. A reasonable observer would know that the Club is open to any child, children are not asked about their faith, and that children with no church background attend the Club meeting, (JA at P19-20), that the Club members are of various grade levels, (JA at P19), that Club members are free not to participate in an activity, (JA at P20), and some members actually do choose to abstain, (JA at P21), and that children can attend the Club ***only*** with the written permission of their parents. Pet. Appx E2(¶6). A reasonable observer would know that out of the approximately 450 secondary students at Milford, only about 28 students attend the Club, (Lodging at AA2(¶8)), and that the only children attending the Good News Club meetings are those sent there by their parents. Pet. Appx E2(¶6). A reasonable observer would know that no Milford employee is involved with the Club. JA at L2(¶9-¶10). A reasonable observer would know that at the end of the Club meeting children are brought home by their parents and not by a Milford bus. JA at P30. A reasonable observer would know that parents who do not subscribe to the Club's message have the opportunity to establish their own clubs after school and that petitioner Andrea Fournier (and other similarly situated children) stay after school for the other

youth groups like the 4-H Club, Junior Girl Scouts, and Daisy Scouts meetings. JA at O8, Pet Appx. D.

With such knowledge of the facts and circumstances, a reasonable observer would not view the Club's inclusion in Milford's limited public forum as "making adherence to religion relevant in any way to a person's standing in the political community." *Capitol Square*, 515 U.S at 783. A reasonable observer would not infer that Milford endorses the Club's message, but "rather the endorsement of the religious message is reasonably attributed to the individuals who select the [religious] path." *See Mitchell v. Helms*, 120 S. Ct. 2530, 2559 (2000) (O'Connor, J., concurring).

Most importantly, a reasonable observer would know that Milford expressly discriminates against religion. Milford's policy simply and starkly states that "School premises shall not be used by any individual or organization for religious purposes." Pet Appx. D2. Such discriminatory exclusion of the Club from Milford's public forum, and not the inclusion of the Club, would violate the Establishment Clause. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating against religion." *Board of Ed. of Kiryas Joel School Dist. v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J. concurring in part and concurring in judgment). By discriminatorily excluding the Club, Milford would be telling parents who want their children to hear the Club's religious perspective "that they are outsiders and less than full members of the political community." *Capitol Square*, 515 U.S. at 773 (internal quotation marks and citation omitted) (O'Connor, J., concurring).

This message of exclusion is not hypothetical, but one that Milford's school board president, Jim Haverner, actually conveyed to Darleen Fournier. Mr. Haverner, in his official capacity, approached Darleen and suggested that the Club

could use a location other than the school. JA at P99-100. He suggested that the "Christian" children leave the school and walk a short distance to the historical society building called the Zayre House. JA at P100. Under Milford's proposal, Good News Club members would assemble *outside* the school while members of the 4-H Club, Daisy Scouts, and Cub Scouts assemble *inside* the school. Club members would then march single file from the schoolhouse steps down the street to the historical society in full public view.

The school board president's message to Darleen was clear: you are welcomed as an activity leader for the 4-H club,[11] but unwelcome as the leader of the Good News Club. What conclusion would a reasonable observer draw under these circumstances about the relevance of Darleen's religion to her standing in the community? No doubt one similar to Ms. Fournier:

> [The proposal was unacceptable because] it reminded me of being in the 60s when black children were told that they could use a different black bathroom and they could sit in a different place on the bus, and that because of our message, being from a Christian perspective, that we were not welcome here. JA at P100.

Milford will send a message to the community by its actions -- either one of tolerance, inclusion, and neutrality, or one of intolerance, exclusion, and bias. The message Milford is proposing to send Andrea Fournier (and other little girls like her) is that if she wears her Daisy Scout uniform, then she is accepted and welcomed by the community, but when she wears her Good News Club "uniform," she would be rejected by and segregated from the community. That is a powerful message, especially for children.

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[11] Darleen is the activity leader of the 4-H Club. Lodging at AA3.

B.

Milford argues that the relevant observer under the endorsement test is a hypothetical child. Predicating an endorsement argument upon a hypothetical child's potential misperception cannot be reconciled with the attributes with which the case law has endowed the reasonable observer.[12]

Even if a hypothetical child observer were the reasonable observer, Milford assumes, but does not offer any evidence, that primary school children cannot distinguish between a private group's after school speech and a teacher's classroom speech. See Brief of Laycock at 25-30 (explaining why the claim that primary students cannot understand that the Club's speech is independent of the school is dubious).

Moreover, it would take an incredible set of imagined circumstances for a hypothetical child to misperceive Milford's community use policy as an endorsement of religion. First, the hypothetical child would not have gone home at the end of the school day, but instead would wander through the school, and during that journey happen to walk by the high school resource room, pause outside the door, happen to hear a part of the Club meeting and interpret that as "religious instruction." Moreover, the hypothetical child would have to be unaware of Milford's extremely broad and inclusive community use policy and wrongly conclude for some inexplicable reason that Milford excludes non-adherents of the Club's message from

[12] The brief of Child Evangelism Fellowship (p.11-19), and the brief of Liberty Legal Institute discuss in detail why under this Court's precedents a reasonable observer under the endorsement test is not a child. Moreover, the Court has not hinged the constitutionality of government aid to private school upon the age of the student. Whether a 6-12 child might misinterpret the significance of government interpreters (*Zobersl*), computers (*Mitchell*), or remedial assistance (*Agostini*) did not factor in the Court's analysis.

using the school on an equal basis or pressures non-adherents to attend Club meetings.

Respondent had ample opportunity to present evidence to support its position, but failed to do so. As respondent correctly notes, Milford "had the rather unique circumstance, as presented by the record, of petitioners being permitted to use the school under the District Court's preliminary order [for a year and a half]." RB at 16. Yet even given these unique circumstances, respondent presented no evidence that any child was confused that Club meetings were not part of the school day. Respondent presented no evidence of any complaint arising from the Club's use. Respondent presented no evidence to contradict the District Court's finding that children who do not attend the Club are unlikely to hear or see a Club meeting. (O10). See *Capitol Square*, 515 U.S. at 811 (Stevens, J., dissenting) (noting that while a religious symbol visually displayed represents an image of endorsement, access to government facilities for "the religious practices" involved in *Widmar* and *Lamb's Chapel* "were simply less obtrusive, and less likely to send a message of endorsement").

This case involves an independent community group not promoted by the school. The group meets at a time and in a place where the meeting is unlikely to be seen or heard by other students. Thus, this is a significantly easier case than the school sanctioned religious club that this Court found constitutional in *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In *Mergens*, after school clubs were "a vital part of the total education program."[13] *Id.* at 231. Furthermore, the school in *Mergens* gave official recognition to and incorporated student clubs into

[13] The Daisy Scouts, Cub Scouts and the 4-H club are not "a vital part of [Milford's] education program" – they are no part of Milford's education program.

official channels of communication such as "the school newspaper, [school] bulletin boards, the [school] public address system, and the annual Club Fair." *Id.* at 247. Despite school-sponsored clubs being "an integral part of [the school's] educational mission," this Court held it was not difficult for students to understand that the government does not endorse everything that is spoken on school grounds. *Id.* at 250 (plurality).

The truth is Milford does not endorse, promote, or encourage the Club's speech. But because false perceptions are possible, Milford claims it must expel Andrea Fournier and the Good News Club members from its facilities. Such a radical proposition ignores one of the Establishment Clause's most fundamental paradigms, that withholding equal access to religious speakers "would leave an impermissible perception that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring).

V. MILFORD HAS NOT DEMONSTRATED THAT CENSORSHIP IS THE LEAST RESTRICTIVE MEANS TO COMPLY WITH ALLEGED ESTABLISHMENT CLAUSE CONCERNS.

Even if the Establishment Clause somehow provided Milford with a compelling state interest (which it does not), Milford still has yet to show that a total ban of the Club from Milford's public forum would be the least restrictive means to comply with the Establishment Clause. *Cf. Playboy*, 120 S. CT. at 1888 (where government seeks to regulate constitutionally protected free speech, least restrictive means must be applied). In this case, as in *Capitol Square*, "a flat denial of the . . . application was not the [government's] only option to protect against an appearance of endorsement." 515 U.S. at 793 (Souter, J., concurring).

Milford takes the extreme position that only total exclusion of the Club from its facilities will satisfy the Establishment Clause. Milford urges that the endorsement test, a delicate tool forged to promote inclusiveness, communication, and education, be converted into a blunt instrument that imposes exclusion, censorship, and ignorance. In essence, Milford argues that censoring free speech is the only remedy to protect against the potential mistaken impression that the government favors religion.

Milford's theory is that the protections afforded the people under the First Amendment are in conflict with one another – and this Court must prefer Establishment Clause over the Free speech Clause. Judge Easterbrook of the Seventh Circuit, addressing a school district's ban on the distribution of "proselytizing materials" by junior high students, offered an analysis that is pertinent here:

> School districts seeking the easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings – here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement — is, however, what schools are for. . . . Yet [the school district] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson [the school district] proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. . . . If pupils do not comprehend so simple a lesson, then one wonders whether [the school district] can teach anything at all. Free Speech, free exercise, and the ban on establishment

> are quite compatible when the government remains neutral and educates the public about the reasons.

Hedges, 9 F.3d at 1299-1300.

Any fear that Milford has that the public may perceive that it is endorsing the Club's speech can be met with education rather than censorship. More speech has always been the First Amendment's solution to misunderstanding. More speech, not less, should be the solution to this case as well.

CONCLUSION

For the reasons argued above, and those expressed in Petitioners' Brief on the merits, the Good News Club, Andrea Fournier, and Darleen Fournier request that this Court reverse the judgment of the Second Circuit with instruction to grant Petitioners the relief they requested in the District Court.

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Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Curiae Christian Legal Society is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors.

Amicus Curiae Union of Orthodox Jewish Congregations of America is a nonprofit organization representing nearly 1,000 Orthodox Jewish congregations throughout the United States. Without reservation, *Amici*, Christian and Jew, join in this brief urging the juridical and moral imperative that religious speech and practice not be the object of intentional discrimination by government.

A more detailed statement of interest of *Amici* is set forth in the Appendix. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.[1]

STATEMENT OF THE CASE

This is a case about discrimination against religious expression and religious practice. Although this Court has affirmed, time and again, that government is not required – and, indeed, is not permitted – to single out religious speech or religious exercise for disadvantage, that is precisely what has happened in this case, and in two ways: *First*, the Milford Central School's Community Use Policy, adopted pursuant to New York statute, expressly prohibits "any individual or organization" from

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[1] Pursuant to Rule 37.6, *Amici* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) *Amicus* Christian Legal Society has applied for a grant from the Alliance Defense Fund to cover expenses in producing this brief. ADF is a 501(c)(3) organization with offices at 8960 E. Raintree Drive, Suite 300, Scottsdale, AZ 85260. ADF exercised no control over the content of this brief.

using school facilities for "religious purposes" (Pet. D2); and *second*, the application of the Policy invites government officials to devise and enforce a distinction between different forms of religious expression – between the discussion of morals and values from a religious viewpoint, on the one hand, and morals and values through religious instruction, on the other (Pet. A16, C15).

At the center of this matter is a public access policy that permits residents to use school facilities for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public." Pet. A2-A3. Such policies make good sense and serve the common good. By opening public property to private groups, these policies support, in a neutral and non-intrusive way, the web of mediating institutions and voluntary associations – the "little platoons" of democracy – that is so essential to a diverse and thriving civil society.[2]

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[2] Richard John Neuhaus raises the moral, along with the juridical, importance of the public-forum issue that is before this Court:

> The civil public square is one in which different convictions about the common good are engaged within the bond of civility. The "common good" is – and we can never tire of making this point – unavoidably a moral concept, and that means the religiously grounded moral convictions of the American people cannot be excluded from the public square. . . . To exclude the deepest convictions of the people from the deliberation of how we ought to order our life together is tantamount to excluding the people from that deliberation, and that is the end of democracy.
>
> Richard John Neuhaus, *Civil Religion or Public Philosophy*, First Things 69, 72 (Dec. 2000).

That said, the Milford Use Policy falls short of its lofty potential in that it does not permit all "uses pertaining to the welfare of the community." Rather, it excludes from school premises all those who seek to promote the "welfare of the community" through activities that, in the minds of government officials, have "religious purposes." Pet. A3. Thus, the question here is whether "to exclude the Good News Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination." Pet. A12. The answer to that question is "yes."

SUMMARY OF THE ARGUMENT

The parties agree that Milford's Community Use Policy creates a limited public forum. *See, e.g.*, Pet. A13 ("We think it clear that the Community Use Policy has created a limited public forum in the Milford school facilities."). And the parties agree that any content restrictions in such fora must be "viewpoint neutral" and constitutionally "reasonable." Pet. A14 & n.8 ("If the Club's use is not a 'religious use' but merely the teaching of morals from a religious viewpoint, . . . Milford's . . . Use Policy would be unconstitutional viewpoint discrimination."). The disagreement involves a building access policy that permits groups to use school facilities to "benefit the welfare of the community," to "promote the morals of children," and to "instruct in any branch of education, learning or the arts," but expressly excludes speakers whose purposes are "too religious" in the estimate of government officials.

This Policy, and the application of it in this case, are unconstitutional. Neither the opinion below, nor the Second Circuit's *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), on which the appeals court relied, can be reconciled with this Court's decisions in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); and *Widmar v. Vincent*, 454 U.S. 263 (1981). *Amici* endorse fully the argument that Milford's Policy constitutes viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. *See, e.g.*, Pet. 16-20; Brief for *Amici Curiae*, the States of Alabama, *et al.*, in Support of Petition for Writ of Certiorari, at 2-12. Judge Jacobs, in dissent below, put the matter well: "When the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters[,]" Pet. A22, and "[w]henever public officials . . . evaluate private speech 'to discern [its] underlying philosophic assumptions respecting religious theory and belief,' the result is 'a denial of the right of free speech.' " Pet. A28 (*quoting Rosenberger*, 515 U.S. at 845).

Our goal in this brief *Amici Curiae* is to supplement Petitioners' powerful arguments under the Free Speech Clause with four additional points. *First*, the Second Circuit's attempt to identify a line between a discussion of "morals from a religious viewpoint," on the one hand, and "morals through religious instruction," on the other – between expression that is "too religious to be merely incidental" to secular subjects and expression that is "secular enough" – not only runs afoul of the Free Speech Clause but violates the Establishment and Free Exercise Clauses as well. Courts and other government officials have neither the competence nor the authority to identify

the point at which private expression crosses an imagined Rubicon of religiosity separating religious "viewpoints" on "secular" subjects – such as "morals" – from religious instruction, worship, or assertions that "morality" is in fact an inherently religious subject. To search for that line, and to police it, is to assume the task of enforcing a particular orthodoxy and to entangle government in matters from which it is constitutionally excluded. *See, e.g., Widmar*, 454 U.S. at 272 n.11 ("We agree . . . that the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.' . . . Initially, the University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.' ") (citations omitted).[3]

Second, Milford's vague fear that treating the Good News Club like other community youth groups might send a "message" of exclusion to impressionable children is both groundless and irrelevant. In crediting this fear, and in concluding that Milford acted "reasonably" in

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[3] Although government may not discriminate against religious viewpoints in a limited public forum, and although government cannot constitutionally distinguish between "too religious" and "secular enough" religious expression, this does *not* mean that local school officials cannot maintain firm control over the use of school facilities. For example, a school could limit the use of its buildings to community youth organizations during weekday afternoons, from 3 to 6 p.m. Or, because of high demand, officials could limit all organizational use of school facilities to twice per month. Or, a school could close the forum altogether. Because the speaker and subject-matter classifications are neutral as to religion, the foregoing illustrations raise no constitutional problems.

using this fear as an excuse for excluding "religious instruction" from its facilities, the Second Circuit implicitly endorsed the mistaken premise that the Free Speech Clause and the Establishment Clause are somehow in "conflict" and that concern for the latter Clause thereby preempts the former. Given this premise, Milford's unfounded scruples about "offending" the Establishment Clause are said to warrant infringing on the free-speech rights of the Good News Club. This makes no sense. Because the Free Speech Clause prohibits government from discriminating against religious viewpoints, the Establishment Clause cannot logically require (or excuse) such discrimination. Rather than conflict, the Clauses work in an independent, but complimentary, fashion, each protecting religious freedom by limiting government.

Third, the Policy is facially unconstitutional because it excludes groups seeking to engage in religious worship and instruction – "religious purposes" – from public facilities while permitting others to use the facilities for non-religious purposes. Not only is this discriminatory treatment not required by the Establishment Clause, it is not permitted by the Free Exercise Clause. A policy that permits community groups to use public facilities for private activities that pertain to the "welfare of the community" but targets for exclusion those groups whose activities have "religious purposes," intentionally discriminates against, and is thereby censorious of, religious exercise.

Finally, and briefly, *Amici* emphasize that Milford's Policy, and its application here, are unconstitutional whether or not any government official opposed or

disagreed with the Club's message. In this area, the government does not need to act invidiously to act unconstitutionally.

ARGUMENT

I.

The First Amendment Does Not Permit Government Officials To Draw and Enforce Distinctions Between "Worship and Religious Instruction" and All Other Forms of Religious Speech

The Second Circuit held that government officials may, in the regulation of a limited public forum, distinguish religious instruction, prayer, and worship from "discussion of secular subjects such as child rearing, development of character, and development of morals from a religious perspective," Pet. A10, and may exclude the former while permitting the latter. Moreover, the appeals court was quite untroubled by the prospect of school officials engaging in the task of marking the metes 'n bounds of "worship" in America or divining the line between "religious purposes" and all other religious discussion. In the court's view, it is " 'not difficult for school authorities to make' the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious materials through religious instruction and prayer." Pet. A16 (*quoting Bronx Household*, 127 F.3d at 215). *Accord Campbell v. St. Tammany Parish School Board*, 2000 WL 1597749, at *4 (5th Cir. 2000) (*per curiam*) (*denying rehearing en banc*) ("A religious service is an activity, a manner of communicating which carries a very special and distinct meaning in our culture. While a service may express a religious viewpoint, for

example, a Catholic mass featuring a prayer for the welfare of the unborn and for the reform of American abortion law, the distinction is between medium and message. . . . [T]hus, a Catholic group could assemble on school property to discuss a Christian anti-abortion viewpoint and distribute . . . material advocating a Christian anti-abortion viewpoint. They would only run afoul of the policy if they also chose to conduct religious services.").

The appeals court was mistaken. It *is* difficult for minor local officials to make this distinction, and impossible for them to make it without engaging in constitutionally forbidden theologizing.[4] To do so, these officials must scrutinize not only the character of a religious group but also the nature of that group's planned expression, programs, and activities. Their inquiry is necessarily complicated by our Nation's ethnic and geopolitical diversity – *e.g.*, school districts, large and small, are inner-city, suburban, and rural – and by the Nation's unique combination of high religiosity and increasing religious pluralism. What strikes one minor official as "religious" or "secular" will inevitably vary from place to place and from person to person. What will seem "too

[4] The difficulty can be illustrated in the case of Jewish youth groups should they engage in the study of morals and good character. From the traditional Jewish perspective, the study of the Bible or the Talmud is viewed as both an intellectual and a devotional exercise to the point that a blessing is made prior to the study of Torah. *See* THE COMPLETE ARTSCROLL SIDDUR 18 (1985). Thus, if an access policy permitted the study of morals from a religious perspective but not worship, local officials would have to make a theologically based distinction between Jewish youth groups – excluded because of the devotional or prayer – and all others, including other religion-based youth groups.

religious" to one school employee – because of variations in background, experience, religious devotion, or lack thereof – strike another as "incidental to worship or secular enough."

Thankfully, though, the line drawn by Milford is one that the Establishment Clause does not permit, let alone require. Nearly twenty years ago, when a dissenting opinion urged a distinction between "religious worship" and other forms of religious expression, an eight-Justice majority of this Court refused, observing that "the distinction [lacked] intelligible content," that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer," and that, in any event, the proposed distinction was constitutionally irrelevant. *Widmar*, 454 U.S. at 269 n.6 (1981). Indeed, the *Widmar* majority stated that the proposed categorization of religious expression was not only unintelligible and unnecessary, it was unconstitutional. *Id.* ("Merely to draw the distinction would require the university – and ultimately the courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases."); *see also id.* at 271 n.9, 272 n.11.

A. The Establishment Clause Does Not Permit Officials To Classify Per Religious Categories Religious Words, Practices, And Events.

Milford's Policy prohibits the use of school buildings by community groups for "religious purposes," including "worship" and "religious instruction" (Pet. A9, A10). Thus, the Policy requires local officials to keep out "praise songs or biblical lessons," for example, while permitting discussions of "otherwise secular subject[s]"

from a religious perspective. This kind of screening inevitably embroils educational employees in the messy business of testing private expression for undue religiosity, and purging excessively devout, or insufficiently inclusive, expression. And, invariably, the Policy's invitation to petty officials to separate the "too religious" from the "secular enough" requires government – including, eventually, the courts – to investigate, probe, and dissect the nature and practices of community-based youth organizations, to glean these practices' religious significance, and to ascribe spiritual meaning (or lack thereof) to private actors' words and activities. But, of course, for a court to conclude that a particular form of expression or subject of discussion has (or lacks) metaphysical meaning is to make determinations that are religious.

In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court faced an ordinance that was, in a sense, the reverse of the Milford Policy. In *Fowler*, a city permitted churches and similar religious bodies to conduct worship services in its parks, but religious meetings were excluded. The ordinance resulted in the arrest of a Jehovah's Witness as he conducted a peaceful meeting. Justice Douglas, in an opinion from which no Justice dissented, overturned the conviction because the distinction between "worship" and an "address" on religion was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 69-70. Officials in Milford are no more competent to include a "religious perspective" but exclude "worship" than were the officials in *Fowler* competent to include worship while excluding a religious address. Both efforts entangle government in theological classification, and both invite covert religious bigotry.

Inquiries by government functionaries into the spiritual significance of a religious organization's programs and solemn observances undermine an important aim of the separation of church and state, namely, keeping government within its sphere of competence, to the purpose of maintaining both the legitimacy of the state and the integrity of religion.[5] It is for this reason that this Court has consistently, and quite sensibly, refused to permit government officials to classify per religious categories a

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[5] William Clancy summarizes well the settlement of church/state relations in America:

> [T]he "wall of separation" metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a "wall" but a logical distinction between two orders of competence. Caesar recognizes that he is only Caesar and foreswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are severe limits on its authority and leaves the churches free to perform their work in society.

William Clancy, *Religion as a Source of Tension*, *in* RELIGION AND THE FREE SOCIETY 23, 27-28 (1958).

religious organization's words, practices, and events.[6] Similar concerns, and a similar recognition of government's lack of competence in theological matters, have animated those decisions holding that the courts lack subject-matter jurisdiction over intra-church disputes involving religious questions.[7] Indeed, judicial

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[6] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 844-45 (1995) (cautioning a state university to avoid having to distinguish between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem when government attempts to divine which ecclesiastical appointments are sufficiently related to the "core" of a religious organization to merit exemption from statutory duties); *id.* at 344-45 (Brennan, J., concurring) (same); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice is desirable); *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (holding that inquiries into significance of religious words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *see Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940) (stating that petty officials are not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit).

[7] This Court has said that it lacks jurisdiction over most disputes concerning church property, doctrine, ecclesiastical policy, the selection or promotion of clergy and ministers, and dismissal from church membership. *See, e.g., Serbian East. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (courts may not probe into church polity); *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (*per curiam*) (courts should avoid doctrinal disputes); *Presbyterian Church v. Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969) (civil courts are forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190,

forbearance about overstepping bounds extends to all civil and criminal litigation – intra-religious or not – that turns on matters of faith, whether these cases involve claims sounding in tort,[8] breach of contract,[9]

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191 (1960) (*per curiam*) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 725-33 (1872) (rejecting implied trust rule because of its departure-from-doctrine inquiry).

[8] *See, e.g., Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp.2d 732, 736-42 (D.N.J. 1999) (dismissing, for lack of subject-matter jurisdiction, libel and slander claim filed against rabbinic association); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1288-90 (D. Minn. 1993) (dismissing defamation action against church where the offensive statements arose out of church controversy); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811-13 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject-matter jurisdiction over defamation claim against church hierarchy); *Gibson v. Brewer*, 952 S.W.2d 239, 247-48 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); *Tidman v. Salvation Army*, 1998 WL 391765, *5-7 (Tenn. Ct. App. 1998) (dismissing invasion of privacy and outrageous conduct tort claims brought by former employees of faith-based organization discharged for having extramarital affair); *In re Pleasant Glande Assembly of God*, 991 S.W.2d 85, 88-90 (Tex. App. 1998) (subject-matter dismissal of negligence claims by parishioner brought against church and youth pastor); *Korean Presbyterian Church v. Lee*, 880 P.2d 565, 568-70 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440-45 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim).

[9] *See, e.g., Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681, 683-84 (Ill. App. Ct. 1994) (holding that

civil-rights and employment legislation,[10] or criminal fraud.[11]

Similar caution is warranted here. After all, judge-made classifications of expression along the lines of

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breach of contract complaint was properly dismissed on First Amendment grounds since the matter of whether to employ plaintiff as a parochial school teacher was an ecclesiastical issue into which civil court may not inquire); *McEnroy v. St. Meinrad School of Theology*, 713 N.E.2d 334, 336-37 (Ind. App. 1999) (subject-matter jurisdiction dismissal of breach of employment contract claim brought by professor of theology against seminary); *Basich v. Board of Pensions*, 540 N.W.2d 82 , 85-88 (Minn. Ct. App. 1995) (holding that First Amendment prevented district court from exercising jurisdiction over action for breach of pension contract and breach of fiduciary duty); *Pearson v. Church of God*, 458 S.E.2d 68, 71-72 (S.C. Ct. App. 1995) (holding that trial court did not have constitutional authority to decide claim for breach of contract); *Smith v. Clark*, 709 N.Y.S.2d 354, 357-59 (Sup. Ct. 2000) (dismissing claim against church for breach of employment contract because courts lack subject-matter jurisdiction over questions of religious doctrine).

[10] *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-67 (D.C. Cir. 1996) (finding EEOC investigation into faculty member's gender discrimination Title VII claim lodged by Catholic nun at religious university was barred by Establishment Clause); *Himaka v. Buddhist Churches of Am.*, 917 F. Supp. 698, 707-09 (N.D. Cal. 1995) (holding that minister's Title VII retaliation claim should be dismissed based on excessive governmental entanglement with religion in violation of Establishment Clause); *Van Osdol v. Vogt*, 908 P.2d 1122, 1131-33 (Colo. 1996) (holding that Establishment Clause insulated a religious institution's choice of minister from judicial review; *Geraci v. Eckankar*, 526 N.W.2d 391, 399-400 (Minn. Ct. App. 1995) (gender discrimination claim by pastor against her church is barred by Establishment Clause).

[11] *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that in trial for mail fraud, the truth or falsity of a religious belief or profession may not be subjected to scrutiny by a jury).

"worship and religious instruction" versus "religious speech on secular subjects" are no less hazardous to administer than those that this Court has refused to draw in these other contexts. There is simply no way to avoid the fact that theologically "liberal" or latitudinarian private speech will often appear to minor local officials as "secular enough," and thus acceptable in school facilities, whereas theologically "conservative" or orthodox organizations will more likely be regarded as "too sectarian," and thus deserving of exclusion from public spaces.[12] This kind of unequal treatment is a paradigmatic violation of the First Amendment. *Larson v. Valente*, 456 U.S.

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[12] It is increasingly recognized that, when it comes to religion and public life, the significant distinctions no longer track the denominational lines separating Protestants, Catholics, Jews, and Muslims. Instead, religious believers are more meaningfully categorized as traditional or "orthodox" (whether Protestant, Catholic, Jewish, or Muslim) and theologically liberal or "progressive" (whether Protestant, Catholic, Jewish, or Muslim). *See* James Davison Hunter, Culture Wars: The Struggle to Define America 42-46 (1991). Professor Hunter explains that orthodox believers are devoted "to an essential, definable, and transcendent authority," whereas progressives "resymbolize historic faiths according to the prevailing assumptions of contemporary life." The latter type of religious organizations, those most willing to conform to contemporary culture, will, unsurprisingly, appear less "religious" or sectarian to government officials, while those who are more conservative in their theology and who have resisted acculturation will appear more sectarian. Clearly, though, to exclude from public spaces and forums – even "limited public forums" – those groups that are more traditional, and that are less able to cast themselves as having only a "viewpoint" on "secular" questions, is to punish those religions that resist conforming to contemporary culture while rewarding those religions willing to mirror secular culture.

228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). A more discriminatory rule than one that privileges some theological traditions over others could hardly be devised.

B. The Free Exercise Clause Also Denies Government Officials Authority To Interpret the Religious Meaning of Religious Practices.

The foregoing is well established Establishment Clause doctrine. But this Court has also rebuffed government efforts to decide religious questions, or to interfere in religious affairs, in Free Exercise Clause cases. For example, this Court has made clear that religious beliefs and practices are constitutionally protected whether or not they are "central" to a religious person's faith.[13] This is because, again, public officials are simply not competent to decide which practices are at the "core" of a particular religious tradition and which are peripheral. For similar reasons, religious doubters and backsliders are protected by the Free Exercise Clause no less than

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[13] *Employment Div. v. Smith*, 494 U.S. 872, 886-87 (1990) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' "); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (rejecting government's argument that free exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance").

those who are orthodox or firm in their faith.[14] Here too, the cases reflect the fundamental insight that civil officials have no juridically intelligible means for resolving doctrinal disputes, or gauging the degree of a claimant's religious fervency, or identifying theologically correct positions. As this Court has observed, "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[15]

C. The Milford Use Policy Embroils School Officials in Unconstitutional Line-Drawing.

The "too religious/secular enough" test invited by the Milford Policy, and applied by the court below, casts

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[14] *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) ("Courts are not arbiters of religious interpretation.").

[15] *Thomas*, 450 U.S. at 716. *See also Smith*, 494 U.S. at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"); *Lyng*, 485 U.S. at 457-58 ("[T]he dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play."); *Lee*, 455 U.S. at 257 ("It is not within the judicial function and judicial competence . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith; [c]ourts are not arbiters of scriptural interpretation.") (citations and quotation marks omitted); *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring) (rejecting non-preferentialism because its application "invite[s] the courts to engage in comparative theology"); *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (observing that courts are "ill equipped to sit as a national theology board").

school employees adrift in the same uncharted waters as would tackling the questions that this Court has consistently avoided in a wide range of First Amendment cases. We emphasize, however, that the problem here is not that government officials are simply interacting with religious organizations. Some regulatory interaction – indeed, some adjustments and cooperation – between government and religious organizations is inevitable, given that government keeps getting bigger and society more complex. Indeed, such interaction can on occasion be mutually beneficial. After all, religious institutions have always played a vital role in promoting the common good, in delivering health care and in administering charitable programs, often in collaboration with government. Thus, *Amici's* argument here is not that the inevitable and unremarkable regulation that affects the operation of religious organizations necessarily invades the "privacy" of religious groups. Rather, we object to a government effort to exceed its constitutionally limited powers by adjudicating subject matters reserved to the sole cognizance of religion and religious organizations[16] – matters that were,

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[16] Professor Max L. Stackhouse notes just how remarkable was the American church/state settlement in that a government should go beyond the protection of the personal free-exercise rights of individuals and to limit its sovereignty by acknowledging another center of competence when it comes to matters of spiritual cognizance:

> [The first] amendment to the Constitution acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority. It is a remarkable thing in human history when the authority governing coercive power limits itself. . . . However much government may become involved in regulating various aspects of economic, technological, medical, cultural, educational, and even sexual behaviors in society, religion is an arena that, when it is doing its own thing, is off limits. This not only an affirmation of the freedom of individual belief or practice, not only an acknowledgment that the state is noncompetent when it comes to theology, it is the recognition of a sacred domain that no secular authority can fully control. Practically, this means that at least one association may be brought into being in society that has a sovereignty beyond the control of government.

Max L. Stackhouse, *Religion, Rights, and the Constitution*, *in* AN UNSETTLED ARENA: RELIGION AND THE BILL OF RIGHTS 92, 111 (Ronald C. White, Jr. & Albright G. Zimmerman eds. 1990). As Professor Stephen Carter has observed, government is invariably tempted to regulate, and reduce the influence of, religion, precisely because religious faith posits a separate and higher authority than that of the state, and is therefore subversive of the state's excessive ambitions. *See generally*, STEPHEN L. CARTER, GOD'S NAME IN VAIN: THE RIGHTS AND WRONGS OF RELIGION IN POLITICS (2000).

using Professor Rakove's apt term, "deregulated" at the Nation's founding.[17]

School officials are not competent to scour the organic charters, programs, lesson books, songs, games, and planned expression of community-based groups, such as the Good News Club, for evidence of excessive religiosity. But the Milford Policy requires exactly this kind of administrative – and eventually judicial – inquiry into the mission and motivations of the "too religious" organizations, so as to separate them from the "mostly

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[17] *See* Jack N. Rakove, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 311-12 (1997) ("[A]t the heart of [Madison's and Jefferson's] support for disestablishment and free exercise lay the radical conviction that nearly the entire sphere of religious practice could be safely deregulated, [and] placed beyond the cognizance of the state[.]").

secular" organizations. Such bureaucratic rummaging might well uncover all kinds of religion-related "facts," but local school officials – and they will be the first to admit as much – lack the training, experience, and theological insight to determine the significance of these facts. To invite petty officials to engage in this kind of inquiry and religious classificaton can only lead to misunderstanding, insensitivity, and even outright sectarian bigotry.[18]

II.

The Establishment Clause Cannot Supply the "Compelling Governmental Interest" Required To Preempt the Free Speech Clause

Although the Second Circuit asserted that it was "eminently reasonable" to exclude the Good News Club from Milford facilities (Pet. A15), the court did not hold that the Establishment Clause justified or required this exclusion. However, in its Brief in Opposition to the Petition for a Writ of Certiorari, Respondent advanced precisely this claim. *See, e.g.*, Opp. 9 ("Petitioner's intended use of Respondent's facilities violates the First and Fourteenth Amendments by forcing Respondent to endorse Christianity over all other religions and over no religion at all.").

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[18] Respondent and its *amici* may contend that the dangers of entangling local officials in the workings of religious groups is an argument for "stricter separation" of religion and government and thus for disallowing the use of after-school facilities by religious groups for any purpose whatsoever. But that course was rejected by this Court, and properly so, at least as far back as its decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

This argument should be rejected, as should its premise, namely, that compliance with the restraints of the Establishment Clause supplies the "compelling governmental interest" to trump what would otherwise be a violation of the Free Speech Clause. This "conflict-between-the-Clauses" makes no sense.

During the last twenty years, this Court has held consistently that religious expression by private individuals is entitled to the same protection afforded political, artistic, and educational expression.[19] In many of these cases, those seeking restrictions on religious speech painted a picture of conflicting First Amendment Clauses: a right under the Free Speech Clause to religious expression without discrimination, on the one hand, and an Establishment Clause command that government not aid religion by permitting use of public property, on the other. Having framed the issue this way, these litigants invited this Court to "balance" the Clauses' commands and to suppress the private speech.

In *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995), for example, the State of Ohio had

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[19] *Rosenberger*, 515 U.S. at 830-32 (1995) (finding viewpoint discrimination in university's denial of printing costs for student-initiated religious publication); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-63 (1995) (finding content-based discrimination against religious speech in public forum not justified by Establishment Clause); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (finding viewpoint discrimination against religious speech); *Widmar*, 454 U.S. at 267-70 (1981) (finding content discrimination against religious speech); *see Westside Bd. of Educ. v. Mergens*, 496 U.S. 226, 247-53 (1990) (plurality op.) (holding that the Equal Access Act, which prohibits discrimination against religious speech at secondary schools, does not violate the Establishment Clause).

created a public forum by allowing citizens to erect temporary displays symbolizing each group's message. But when the Ku Klux Klan sought permission to erect a Latin cross during the Christmas season, state officials balked. The Klan then sued to vindicate its free-speech rights. This Court rejected the state's argument that the Establishment Clause justified or required silencing the Klan's speech. Because the Establishment Clause was not violated by the presence of the cross, the state was ordered to permit the religious display on the same basis as all other citizen displays. *Id.* at 762-70.

Although the *Pinette* Court re-affirmed that private religious speech is protected by the Free Speech Clause from discrimination, in *dicta* it also indicated that, in another case presenting different facts, the Establishment Clause might well require the suppression of private religious speech. *Id.* at 761-62. This makes no sense, and this Court should reject any invitation to use the Establishment Clause as a sword driving private religious expression from the marketplace of ideas.

First, even if there were a "clash" between the Establishment Clause and the Free Speech Clause – and it is not – why resolve the conflict by tipping the "balance" in favor of no-establishment? The courts could just as easily – and no less arbitrarily – conclude that the duty to comply with the Free Speech Clause requires cutting back on no-establishment. There is no principled way for courts to rank order the protections in the First Amendment, or to award no-establishment a better place in line than free speech or vice versa.[20] There is, however, the

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[20] *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of

real danger that judges – who are not hostile to religion so much as they are without expertise in the subject – will more often than not "balance" matters in a way that either misunderstands or trivializes matters of faith.

Second, the Clauses are not in conflict. Neither the Free Speech Clause nor the Establishment Clause, when ratified in 1791, delegated new powers to Congress (or, for that matter, the Executive or Judiciary).[21] Quite the contrary: these provisions limited those powers previously granted. That is, the Free Speech Clause and the Establishment Clause are both "negatives" on, or subtractions from, the government's power. While the Clauses can overlap and reinforce one another, two "negatives" on governmental power can never logically conflict.

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constitutional values . . . to invoke the judicial power of the United States.") (footnote omitted).

[21] In *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870), the Supreme Court observed:

> The preamble to the [congressional] resolution submitting [the Bill of Rights to the States] for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of [federal] powers, that further declaratory and *restrictive* clauses should be added." . . . Most of [the proposed] amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

Id. at 535 (emphasis in original). The Preamble in its entirety is reproduced at 5 THE FOUNDERS' CONSTITUTION 40-41 (Philip B. Kurland & Ralph Lerner, eds. 1987).

Third, the Establishment Clause restrains government and government alone. Private actors cannot violate the Clause, because it does not regulate their conduct or expression. Thus, in any free speech case involving religion, the first question to ask is whether the speech in question is government speech or private speech. If the speech is government speech (or private speech adopted by the government),[22] and its content is inherently religious, then – clearly – the Establishment Clause prohibits the speech. This is borne out in the case law dealing with school prayer, devotional Bible reading in school, teaching the biblical account of creation as science, civic veneration of the Ten Commandments, and the like.[23]

On the other hand, not only is private speech not restrained by the Establishment Clause, the Free Speech and Free Exercise Clauses affirmatively protect the speech. *See, e.g., Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.) ("[T]here is a crucial difference between

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[22] We realize that it is sometimes hard to tell whether the speech of a private individual has been adopted by the government as its own. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2279 (2000) (striking down school policy of conducting student election on whether to have prayer at football games delivered by elected student speaker). That said, courts confronted with cases of mixed government/private speech should not aim to suppress the private speech but should instead enjoin only those governmental actions that adopt the private religious message.

[23] *See generally, e.g., Santa Fe Indep. Sch. Dist., supra; Lee v. Weisman, supra; Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original).

Logically there can be no "conflict-in-the-Clauses." Instead, the various Clauses work together to safeguard religious freedom by protecting private expression while restraining government coercion and intrusion into religious matters.

III.

The Use Policy Intentionally Discriminates On the Basis of Religion and Therefore Violates the Free Exercise Clause

Milford insists it must exclude "worship and religious instruction" from the limited public forum. The discrimination is required, Milford contends, either by reason of the Establishment Clause or simply to honor the community's desire for a clear demarcation between church and state. *See, e.g.*, Brief in Opp. 9 ("Petitioners' intended use of Respondent's facilities violates the First and Fourteenth Amendments by forcing Respondent to endorse Christianity over all other religions and over no religion at all."). This cannot be the law, for both of these rationalizations are at odds with the Free Exercise Clause. The Free Exercise Clause prohibits intentional discrimination by government against a particular religion or religion in general,[24] as well as discrimination that disfavors

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[24] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (striking down ordinances that intentionally discriminated against Santeria religious practice); *Smith*, 494 U.S. at 877 (government "may not . . . impose special disabilities on the basis of religious views or religious status"); *McDaniel v.*

particular religious practices.[25] Milford's policy excludes speech and related practices thought by school officials to be "worship or religious instruction" and is therefore a textbook example of intentional discrimination. Accordingly, the Policy can be justified only upon a showing that the burden is necessary to satisfy a compelling governmental interest.

The Second Circuit did not consider whether the Policy violated the Free Exercise Clause. The free-exercise question, of course, had already been foreclosed by the decision in *Bronx Household, supra*. In that case, the Second Circuit held that the discrimination in the New York statute did not make out a prima facie case under the Free Exercise Clause:

> [The speech exclusion did] not bar any particular religious practice. [It does] not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to practice their religion, albeit in a location separate from [the school building.] "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. That right

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Paty, 435 U.S. 618, 626 (1978) (striking down state constitutional clause that intentionally discriminated against clerics seeking public office).

[25] The Free Exercise Clause prohibits more than just intentional discrimination on the basis of religion or religious affiliation. The Clause also prohibits intentional discrimination on the basis of a particular religious belief or practice. Government may not "impose special disabilities on the basis of religious views or religious status," *Smith*, 494 U.S. at 877, or regulate the conduct of slaughter of small animals "because it is undertaken for religious reasons," *Lukumi*, 508 U.S. at 532.

> has not been taken from the members of the Church.

Id. at 216. In other words, in the view of the *Bronx Household* panel, so long as the school does not ban a religious practice at all times and all places, the school is free and clear. It would mean the Clause prevents nothing short of a national effort to outlaw a religious group or a campaign to completely ban a central tenet of the faith. Such a rule would drain the Free Exercise Clause of all meaning.[26] The government will not be heard to say a citizen has no First Amendment right merely because the right can be exercised at another time or place free of molesting officials.[27]

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[26] Admittedly, the Free Exercise Clause does not grant *more* than equal rights for religious expression. *Heffron v. International Soc'y of Krishna Consciousness*, 452 U.S. 640, 652-53 (1981) (dealing with solicitation on state fair grounds). But the Free Exercise and Free Speech Clauses *do* require no less than equal treatment for religious speech. This is not to collapse the two Clauses into one. The Free Exercise Clause has an independent reach of its own, namely, the protection of religiously inspired *action*. This point was succinctly stated by Justice White in *Welsh v. United States*, 398 U.S. 333 (1970):

> It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.

Id. at 372 (dissenting opinion).

[27] *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 541 n.10 (1980) (observing that this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative

IV.

That School Officials Had No Animus Toward the Good News Club Or Its Message Is Irrelevant

Neither the Second Circuit nor the District Court considered the motives of the officials who adopted and applied Milford's Policy, and Petitioner did not allege bad faith or invidious intent on Milford's part. Still, in light of the Fifth Circuit's recent *per curiam* order denying rehearing *en banc* in *Campbell v. St. Tammany Parish School Board*, *supra*, it is worth emphasizing that no such proof is required.

Campbell involved a challenge to a school policy similar to the one at issue here. St. Tammany's policy permitted "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community" but excluded "religious services or religious instruction." *Id.* 2000 WL 1597749 at *1; *see also Campbell v. St. Tammany's School Board*, 206 F.3d 482, 484 (5th Cir. 2000). In its *per curiam* opinion, the Fifth Circuit insisted that the policy "is not viewpoint discriminatory," 2000 WL 1597749 at *3, relying on the same distinction employed by the Second Circuit "between prohibiting religious services and prohibiting expression from a religious viewpoint[,]" *id.* at *4; *see also* 206 F.3d at 487 ("Religion may be either a perspective on a topic such as marriage or may be a substantive activity in itself.").[28]

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means of expression"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[28] The Fifth Circuit was unmoved by this Court's decision to grant *certiorari* in this case, although, interestingly, in distinguishing the case before it from this one, it observed that

Indeed, the Fifth Circuit asserted that "[t]he policy's express tolerance of discussion from a religious viewpoint rebuts any inference of viewpoint discrimination." 2000 WL 1597749 at *3.[29]

Again, like the Second Circuit below, the court in *Campbell* was confident that the policy was "supported by rational reasons[.]" *Id.* It added, however, that "[e]specially where, as here, the school district has affirmative evidence that its motive was not viewpoint discrimination, such reasons need only be rational." *Id.*; *see also id.* at *5 ("[T]here is no evidence that [the Parish's] efforts to create a limited public forum or its application of its rules are a pretext for viewpoint-based discrimination."), *id.* at * 3 n.19 ("The provisions of St. Tammany's policy that expressly permit discussion of religious viewpoints provide affirmative evidence that the policy is not driven by viewpoint discrimination.").

The Fifth Circuit was mistaken when it suggested in *Campbell* that a failure to allege or prove invidious motive behind the discrimination prejudiced the claim that the

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"[t]here is a powerful argument that such a prohibition [as the one against "religious purposes" contained in the Milford Use Policy] is facially invalid as inevitably presenting viewpoint discrimination." 2000 WL 1597749 *5.

[29] Like the appeals court below, the Fifth Circuit missed the point entirely. It is *precisely* by insisting that a meaningful distinction can be drawn between "discussion from a religious viewpoint" and more overtly religious, and therefore unwelcome, expression that the St. Tammany Policy and the Milford Policy discriminate against a particular viewpoint, *i.e.*, the viewpoint that questions of morality, character, and meaning are *inherently* religious subjects and that discussions about such subjects are either religious or nonsensical. No one suggests that the government has to agree with this viewpoint, but it may not discriminate against it.

policy violated the Free Speech Clause. As this Court observed in *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991), the controlling cases "have consistently held that '[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.' . . . [A plaintiff] need adduce 'no evidence of an improper censorial motive.' . . . As we [have] concluded [elsewhere]: 'We have long recognized that even regulations aimed at proper government concerns can restrict unduly the exercise of rights protected by the First Amendment.' " *Id.* at 117 (citations omitted). By the same token, this Court should not treat Milford's presumed good faith in drafting and applying its Policy as being relevant to Petitioner's argument that Milford's Policy is unconstitutional.

CONCLUSION

For all the foregoing reasons, *Amici* urge this Court to reverse the judgment of the court below.

Respectfully submitted,

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November 30, 2000

APPENDIX

Statements of Interest of *Amici*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 145 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked to safeguard religious belief and practice, as well as preserving the autonomy of religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to protect religious exercise in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interaction of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the U.S. Supreme Court involving church/state relations.

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The Union of Orthodox Jewish Congregations of America (the "U.O.J.C.A.") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute

for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with this Court in many of the important cases which affect the Jewish community and American society at large.

Of particular relevance to this case, the U.O.J.C.A. is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious and social programming for over 40,000 American teenagers annually through weekend retreats, summer trips and after-school clubs. NCSY's mission is one that is religious, but invites any Jewish teen, regardless of their level of affiliation or observance, to participate. Clearly, this case will have a substantial impact upon the ability of NCSY to serve high school students throughout the United States; it will determine what elements of Jewish tradition and thought NCSY may include in its after-school programming should it wish to conduct such programming on public school grounds.

But the significance of this case to the American Orthodox Jewish community goes beyond the realm of youth programming to the ability of our community to grow and flourish for our adults as well. Due to the centrality of communal prayer in Jewish life, Jewish communities invariably have a synagogue at their center. Each morning and evening, Jews gather for daily prayers and each Saturday we gather for weekly Sabbath prayers. A unique feature of Sabbath observance for Orthodox

Jews is to desist from using modern forms of transportation such as cars, buses and trains. Thus, for Orthodox Jews to be able to gather for communal prayers on the Sabbath, a meeting place for such groups must be present within walking distance of any community in order for it to enjoy the fullness of its religious observances. Thanks to the freedoms enjoyed by citizens of this nation, the Orthodox Jewish community is the fastest growing segment of the American Jewish population with an acute need to expand or found new communities. The ability to rent facilities, such as geographically convenient public schools, is necessary for nascent communities to expand or grow to the point where they can undertake the construction of a new synagogue.

U.O.J.C.A. is supporting the Petitioners because it believes that New York Education Law § 414 is a roadblock to the Orthodox Jewish community's full enjoyment of its constitutional rights. U.O.J.C.A. believes that the limited forum doctrine may not be used to support viewpoint-based discrimination against religious speech and that the Establishment Clause may not be raised as a defense for what is essentially religious discrimination.

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In The

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THE GOOD NEWS CLUB, ET AL.,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF DOUGLAS LAYCOCK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS

Amicus Douglas Laycock is Professor of Law at The University of Texas at Austin. I have studied issues of free speech and religious liberty for many years, and I have supported vigorous enforcement of the Establishment Clause as well as the Free Speech and Free Exercise Clauses. Last Term, I represented plaintiffs who objected to school-sponsored prayer at football games in *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000).[1]

In earlier years, I filed the principal amicus brief in support of a family who objected to school-sponsored prayer at graduation in *Lee v. Weisman*, 505 U.S. 577 (1992), and an amicus brief in support of those who objected to a school district drawn on religious lines in *Board of Education v. Grumet*, 512 U.S. 687 (1994). I have also filed amicus briefs on the other side of the long-running battle over prayer and religious meetings in public schools, supporting the rights of religious speakers in *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995), and *Board of Education v. Mergens*, 496 U.S. 226 (1990). I have addressed the issues surrounding this case in a scholarly article, Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986), and in testimony opposing any form of school-prayer amendment to the Constitution. Statement, in *Religious Liberty, Hearings*

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[1] I prepared this brief myself, without consulting counsel for any party. No other person made any financial contribution to the preparation or submission of this brief. I file this brief in my personal capacity as a scholar, and of course The University of Texas takes no position on the issues in this case.

Before the Senate Committee on the Judiciary, 104th Cong., 1st Sess. 66 (1995) (S. Hrg. 104-758).

This brief speaks in my own voice and offers expertise from a position of relative neutrality in the so-called culture wars. I attempt to place this case in broader constitutional context, to emphasize why staunch opponents of school-sponsored prayer should support petitioners' claim to free speech here, and to identify the clear rule that consistently explains this Court's cases on religious speech in public schools. I also diagnose a weakness or loophole in the Court's public forum doctrine – a weakness that is facilitating misunderstanding or evasion of the Court's rules on religious speech.

This brief is filed with consent of the parties. Petitioners' consent is on file with the Court, and respondent's consent is submitted with the brief.

SUMMARY OF ARGUMENT

This case is controlled by the clear principle to which this Court has adhered for forty years, crystallized in *Board of Education v. Mergens*, 496 U.S. 226 (1990): "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250 (plurality opinion). If the school controls the speech, arranges for the speech, or gives preferential access to the speech, it is governmental speech. If not, it is private speech. This Court has never found an exception to the part of this rule protecting private speech. This Court has *never* held, in *any* context, that government may or must discriminate

against a private speaker based on the religious content of his speech.

This rule has encountered continuing resistance from both sides. Whether from innocent confusion or deliberate evasion, anti-prayer school districts have resisted this Court's free speech cases as vigorously as pro-prayer school districts have resisted the establishment clause cases. Milford's argument this Term is no better than Santa Fe's argument last Term. Both sides of the dispute require clear rules that are hard to evade.

Meetings of the Good News Club would be private speech under this Court's cases. Milford Central School has created a designated forum, open to community groups in general, and actively used by groups teaching morals and character development to children. Milford excludes the Good News Club from that forum because it teaches that morals should be based on Christian faith. This is viewpoint discrimination, pure and simple.

The attempt to recharacterize this discrimination as a mere subject matter exclusion fails on its own terms. Club meetings are not confined to topics on which there is no secular viewpoint, such as the nature of the Trinity. Instead, they address issues of morals and character development that are also addressed from secular perspectives. The court below did not dispute this. Rather, it held that whatever the Club says about morals and character development is tainted by what it says about faith, and that the whole is therefore excludable. The source of this taint is the Club's viewpoint – in particular, its view that childrens' morals should be based on Christian faith.

More generally, the distinction between religion as viewpoint and religion as mere subject matter is untenable and subject to abuse. Religion is both, as this Court has repeatedly recognized. For people who believe that religious faith is a principal source of instruction on all the other important decisions in their lives, religion is both a prolific source of viewpoints and a vitally important subject matter. For people who do not share the underlying viewpoint, religion is neither a source of other viewpoints nor a subject matter worth discussing. When viewpoint and subject matter are so closely aligned, constitutional rights cannot be made to depend on the distinction without close judicial scrutiny.

It appears that the real operative rule in the Second Circuit is not a distinction between religious viewpoint and religious subject matter, but a per se ban on speech that resembles religious worship – no matter what viewpoints it expresses. This rule violates the ban on viewpoint discrimination. Moreover, a distinction between worship and other religious speech was expressly considered and rejected in *Widmar v. Vincent*, 454 U.S. 263 (1981).

More generally still, this case illustrates a weakness or loophole in this Court's public forum doctrine. Decisions to restrict the subject matters or classes of speakers in a designated forum, or to close the designated forum entirely, appear to be largely immune from judicial review. This leaves important rights of free speech to the unrestricted discretion of government officials. Subject matter exclusions can readily be manipulated to achieve viewpoint results, and inevitably have important viewpoint consequences even without manipulation. Exclusion of a controversial subject matter necessarily insulates

the status quo. It is futile for the Court to strictly scrutinize viewpoint discrimination if it gives no scrutiny to subject matter exclusions.

This larger doctrinal problem need not be solved to decide this case, but solutions are available. One solution to the larger problem may be found in the concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-703 (1992) (Kennedy, J., concurring). A more modest solution would be to require some functional justification for limits on, or closures of, designated fora.

Finally, permitting the Good News Club to participate in the designated forum on an equal basis would not violate the Establishment Clause. That is settled in this Court's cases, and the elementary school context does not change the result. Milford has offered no evidence that the children cannot understand the difference between a school program and an outside program, and it has made no effort to explain the difference. The difference can be explained in simple terms, appropriate to the age of the children.

More fundamentally, the argument that the children cannot understand proves nothing, because it cuts both ways. Assume the children cannot understand that permitting the Club to meet is not an endorsement. On that assumption, they certainly cannot understand that excluding the Club because of its religious views is not a statement of hostility to religion. Indeed, their perception of censorship would be accurate; their hypothetical perception of endorsement would be mistaken. A reasonable perception of endorsement must be based on some favoritism from the school, subtle or flagrant. There is no

favoritism, and no basis for a perception of endorsement, in admitting the Club to a designated forum on equal terms with other programs for children.

ARGUMENT

I. The Religious Speech at Issue Is Private Speech, Protected by the First Amendment.

For forty years, litigants have brought to this Court a steady flow of cases concerning religious speech in the public schools. And for forty years, this Court has decided those cases with remarkable consistency. Without a single exception in all that time, this Court's school cases are explained by the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

This distinction between government speakers and private speakers is at the very core of the First Amendment. The difference between protected free speech and free exercise of religion, on the one hand, and forbidden establishment of religion on the other, is the difference between private action and government action. In our system, religion is left wholly to private choice. Citizens may freely debate, practice, and implement their religious beliefs, but government may not participate. *Lee v. Weisman*, 505 U.S. 577, 589-92 (1992). Government's duty is to protect both religious and secular speech and to remain neutral between the two. In places where government permits expression of a diverse range of views, it has

neither the duty nor the authority to exclude religious speakers.

By carefully distinguishing government speech from private speech, this Court has adhered to a rule against school-*sponsored* prayer. But the common phrase to describe these cases in popular speech is simply "school prayer." The shorter phrase is not harmless, for it omits the critical concept of government sponsorship. And indeed, the more aggressive advocates on each side seem to reject the Court's focus on school sponsorship. One side would permit schools to sponsor prayer and religious instruction; the other side would prohibit all prayer and religious instruction in or about public schools, no matter how privately organized.

These extreme positions are of course inconsistent with the basic principle in this Court's cases. So litigants on both sides have taken to offering strained interpretations of the principle. Last Term, supporters of school prayer claimed to see purely private speech in an elaborate scheme to accord exclusive access to a single student who would lead large crowds in prayer; the Court properly found school sponsorship. *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000).

In this case, opponents of school prayer claim to see government sponsorship in mere equal access. Milford claims that it would be school sponsorship merely to permit a private group to meet after school under the terms of a policy that opens school facilities to a vast range of community groups, and that opening school facilities to secular community groups while excluding religious community groups is neither discrimination nor censorship but merely a neutral definition of the scope of

the school's forum. In sharp contrast to Santa Fe's single speaker with exclusive access to the public address system, Milford really does have a diverse array of community groups using its designated forum. Milford's claims are no more plausible than Santa Fe's. Both school districts – Milford this year and Santa Fe last year – are in fact rejecting the basic principle that has guided this Court's cases for forty years.

Whether from innocent confusion or deliberate evasion, there is a similar history of resistance on both sides of the issue. Before the Equal Access Act, 20 U.S.C. § 4071 *et seq.* (1994), many school districts in New York and elsewhere prohibited religious speech without explanation or out of exaggerated concerns about the Establishment Clause. *See, e.g., Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980). After the Equal Access Act defined open fora in secondary schools in terms of whether the school permitted "one or more noncurriculum related student groups," 20 U.S.C. § 4071(b) (1994), these schools insisted that the Act had no effect, because every secular club is curriculum related but religion clubs are not. This Court rejected that claim in *Mergens*, 496 U.S. 226 (1990). Then these school boards said that in any case outside the scope of the Act, religion would be an excluded subject matter even if the school had created a public forum. This Court rejected that claim, holding that religious speech expresses protected viewpoints. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). These school boards still did not change their behavior; now they seek to exclude some subset of religious speech that assertedly does not express protected viewpoints. This subset is ill-

defined but substantial; it seems to include all or substantially all religious speech and to largely nullify *Lamb's Chapel*.

The schools' argument and the definition of what is excluded have been repeatedly fine-tuned, but the common theme is the same: some school boards will discriminate against religious speech until this Court adopts unambiguous rules that eliminate all room for misunderstanding or evasion. These anti-religious school boards are every bit as persistent as the pro-religious school boards in cases like *Santa Fe*. The Constitution is equally offended in each case: when a religious majority in Santa Fe imposes its prayers on religious and secular minorities, and when a secular majority in Milford denies a religious minority the right to meet and teach its faith to those who wish to learn it. In each set of cases, the solution is to avoid rules that facilitate misunderstanding or evasion.

Identifying government sponsorship is not so difficult as it is made out to be by litigants unhappy with the underlying rule. Justices have disagreed about nuances in the formulation of a test, but all of this Court's judgments are consistent with the simple rule that if persons are speaking in their private capacities, then government cannot discriminate for them or against them based on the religious content of their speech.

To elaborate: Religious speech is attributable to the government if government employees select the religious message, *Engel v. Vitale*, 370 U.S. 421 (1962), deliver the religious message, *Abington School District v. Schempp*, 374 U.S. 203 (1963), encourage or endorse the religious message, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Treen v. Karen B.*,

455 U.S. 913 (1982), arrange for the religious message, *Lee v. Weisman*, 505 U.S. 577 (1992), or give an otherwise private speaker preferential access to a school forum, program, audience, or facility, *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000); *Stone v. Graham*, 449 U.S. 39 (1980). This Court has found no exception in a school context to the rules stated in this paragraph since *Zorach v. Clauson*, 343 U.S. 306 (1952).

Zorach is an exception to the rule against government sponsorship, at least as measured by the criteria in the preceding paragraph, because the school provided preferential access to a school audience. The school created a "forum" in which the only choices were religious instruction at a local church or essentially custodial care by the school. The Court upheld the program anyway. There have also been two more recent exceptions outside the school context. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting municipal Christmas display); *Marsh v. Chambers*, 463 U.S. 783 (1983) (permitting legislative prayer).

These cases permit government to sponsor religious messages in certain limited contexts. With respect, I believe that all three of these cases were wrongly decided, and I do not rely on them here. My position is not that government may support religion a little bit, and certainly not in public schools. Rather, my position is that permitting religious groups to meet on the same terms as other groups is no support at all, and that forbidding them to meet on equal terms is anti-religious censorship.

If government has not endorsed religious speech by one of the means just discussed, that speech is private, and constitutionally protected. To elaborate: If a private

speaker selects and delivers his own message, if government employees express no opinion about that message, if government employees do not invite or arrange for the message, if government employees give the speaker no preferential access to government fora, programs, audiences, or facilities, and in general, if government employees treat the religious speaker like secular speakers similarly situated, the religious speech is attributable to the private speaker. This is the rule in public schools. *Lamb's Chapel*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226 (1990). It is the rule in higher education. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). It is the rule on other government property. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995); *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). This Court has *never* found an exception in *any* context to the rule stated in this paragraph.

The point is broader than speech on government property. This Court has never doubted the right to make religious arguments in political debate, *see Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and it has upheld the right of clergy to hold political office. *McDaniel v. Paty*, 435 U.S. 618 (1978). *See generally* Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. Davis L. Rev. 793 (1996). This Court has *never* held in *any* context that government may or must discriminate against a private speaker based on the religious content of his speech. The judgment below is without precedent in this Court.

II. The Second Circuit Rule, Authorizing Exclusion of Speech on Religious "Subject Matter," Is Inconsistent With This Court's Cases and With the Free Speech Clause.

A. Exclusion of the Good News Club Is Viewpoint Discrimination.

Milford has excluded the Good News Club squarely on the basis of its viewpoint. Moral instruction and character development from a secular viewpoint is permitted; moral instruction and character development from a religious viewpoint is forbidden. This is viewpoint discrimination, and not a mere subject matter exclusion.

This Court has twice rejected the argument that religion is just a subject matter and not a source of viewpoints on the whole range of other issues facing society. *Rosenberger*, 515 U.S. 819 (1995); *Lamb's Chapel*, 508 U.S. 384 (1993). The Second Circuit has attempted to distinguish those cases by holding that religion is *sometimes* a source of viewpoints and *sometimes* just a subject matter. *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000); *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997). For reasons to be explained, I believe this distinction is fundamentally flawed. But even taking the distinction on its own terms, it cannot explain the judgment below.

The Second Circuit's distinction between subject matter and viewpoint presupposes a religious discussion that is directed entirely inward, directed to purely religious questions, and expressing no viewpoint on any issue that might also be addressed from a secular viewpoint. An example might be a theological disputation about the

nature of the Trinity. A religious discussion directed outward, to issues that could also be addressed from secular viewpoints, is necessarily expressing a religious viewpoint on those other issues.

The Good News Club's discussions are directed outward. The Club addresses issues of morals and character development of children that can also be addressed from secular viewpoints, and that in fact are addressed from secular viewpoints by other organizations in the forum at Milford Central School. To exclude the Club's religious viewpoint on these issues is viewpoint discrimination, barred by this Court's cases, even if that expression of viewpoint is only part of the discussion.

The holding below is not that the Good News Club expressed no viewpoints on matters of secular significance, but rather that its protected expressions of viewpoint on morals and character development are disqualified by related discussions that the court of appeals found too religious. "Though [the Club's] teachings may involve secular values such as obedience or resisting jealousy, the Christian viewpoint, as espoused by Reverend Fournier, contains *an additional layer*." *Milford*, 202 F.3d at 509 (emphasis added). "The activities of the Good News Club do not involve *merely* a religious perspective on the secular subject of morality." *Id.* at 510 (emphasis added). "[T]he Good News Club goes far *beyond merely stating its viewpoint*." *Id.* (emphasis added). This "additional layer" may be barred, allegedly because it is subject matter and not viewpoint.

This is a holding of taint: that a discussion of Christian faith so taints the discussion of morals and character development that both discussions are disqualified from

the forum. *Rosenberger* rejected this notion of taint; it was not disqualifying there that the disputed magazine was permeated with expressions of evangelical Christian faith. *See* 515 U.S. at 825-26; *id.* at 865-67 (Souter, J., dissenting). The magazine drew on that faith to express viewpoints on a wide range of issues facing college students, and that was the dispositive fact. *Id.* at 828-37 (opinion of the Court). The *Lamb's Chapel* opinions say less about the content of the disputed film series in that case, but almost certainly those films contained expressions of Christian faith that would be disqualifying under the decision below. *See* 508 U.S. at 388-89 n.3, especially paragraph 5. The Second Circuit's distinction, as applied in this case, in fact distinguishes nothing.

The source of the disqualifying taint is precisely the Club's viewpoint. The Good News Club believes that children are more likely to adopt sound moral principles, and more likely to live up to those principles, if their moral efforts are supported by Christian faith. That viewpoint links the several parts of a Good News Club meeting and makes the discussion of Christian faith an integral part of the discussion of morals and character development. And in the opinion below, it is the manifestation of that viewpoint that disqualifies the Club from speaking. This is precisely the viewpoint discrimination that this Court's decisions forbid.

B. The Distinction Between Religion As Viewpoint and Religion As Subject Matter Is Untenable and Readily Subject to Abuse.

However formulated, the distinction between religion as viewpoint and religion as subject matter is untenable. Religion is both viewpoint and subject matter, and it

is commonplace for discussions of faith or theology to be integrally connected to discussions of morals and other issues that are also addressed from secular viewpoints. Nearly all religious believers think that their faith has implications for their morals and for other issues in their life.

The Second Circuit's original and still principal example of religion as mere subject matter, free of viewpoint, is a worship service. *Full Gospel Tabernacle v. Community School District 27*, 164 F.3d 829 (2d Cir. 1999); *Bronx Household*, 127 F.3d 207 (2d Cir. 1997). Its opinion in this case relies principally on a perceived analogy between certain elements of a Good News Club meeting and certain elements of a worship service. *Milford*, 202 F.3d at 510. Perhaps the true Second Circuit rule is simply that worship services (and any other speech that too closely resembles elements of a worship service) can be excluded.

If this is the rule, it has nothing to do with the distinction between viewpoint and subject matter. It is common for worship services to express viewpoints on moral and other issues, in the sermon or homily, in the scripture readings, or in other ways. The Second Circuit rule appears to be that worship-like speech may be excluded no matter how many viewpoints it expresses on issues that can also be addressed from secular viewpoints. But if that is the Second Circuit rule, it is in the teeth of this Court's emphatic prohibitions on viewpoint discrimination. It is also in the teeth of *Widmar v. Vincent*, 454 U.S. 263 (1981), which held that on-campus worship services are protected by the Free Speech Clause, *see id.* at 265 n.2 (describing the disputed meetings), and which

expressly rejected any distinction between worship services and other religious speech, *id.* at 269-70 n.6.

Widmar rejected any distinction between religious worship and other religious speech for three sound reasons: that the distinction lacks intelligible content; that even if the distinction could be specified, government would be incompetent to administer it; and that there is nothing in first amendment policy or principle to support it. *Id.* There is a fourth reason: any attempt at enforcement requires the censor to monitor meetings in the most intrusive way. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 56-57 (1986) (elaborating all four points). A clear illustration of the final point comes from The University of Texas, which for a time before *Widmar* tried to enforce a rule that student meetings and rallies could speak about religion but could not proselytize. An assistant dean of students found himself assigned to monitor daily rallies and pull the plug on the loudspeaker when he thought a group had stepped over the line. *Id.* at 57. Such Orwellian absurdities are the inevitable outcome of any serious effort to draw fine distinctions between kinds of religious speech.

Subject matter and viewpoint are so closely linked in the case of religion that it is nearly impossible to distinguish religious speech that expresses viewpoints on matters of secular significance from religious speech that does not. Even if it is possible in a few cases, it is impossible in most cases. For people who believe that religious faith is a principal source of instruction on all the other important decisions in their lives, religion is both a prolific source of viewpoints and a vitally important subject matter. For those who believe that religion is

marginal to their lives, or an imaginary construct, or a negative influence in other people's lives, religion is rarely a source of viewpoints and rarely a relevant subject matter. When subject matter and viewpoint are so closely aligned, it is naive to think that courts or administrators can exclude the subject matter without discriminating against the associated viewpoints. Certainly they have not done so here.

This untenable distinction is the key to the judgment below and to similar judgments in a wide range of contexts. The judgment below is in no way based on the fact that this case arises in an elementary school. The judgment is not based on the Establishment Clause, nor on any view that there is no right to a forum in elementary schools. The judgment is based squarely on the Second Circuit's rule that religious speech with elements of worship is mere excludable subject matter and not a viewpoint. This rule is regularly applied to adults and to contexts unrelated to schools. The rule originated in *Bronx Household*, 127 F.3d 207 (2d Cir. 1997), a case in which a church sought to rent space on the weekend.

The Second Circuit's rule is spreading to other circuits and other facilities. It has been applied to use of school facilities by an adult community group in *Campbell v. St. Tammany's School Board*, 206 F.3d 482 (5th Cir. 2000). Similar arguments were made in an unsuccessful attempt to exclude a film from a senior citizens' center, *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), and are at issue in a pending case about use by an adult community group of community meeting rooms in a village hall. *DeBoer v. Village of Oak Park*, 86 F. Supp. 2d 804, 810-11 (N.D. Ill. 1999), *appeal pending*. This Court should squarely consider, and squarely reject, the Second

Circuit's rule authorizing exclusion of religious subject matter from public facilities.

C. This Court's Current Formulations of Forum Doctrine Invite Censorship of the Kind at Issue in This Case.

Milford's exclusion of religious subject matter is a misunderstanding or evasion of this Court's decisions in *Lamb's Chapel* and *Rosenberger*. But evasion is made possible, perhaps even invited, by weaknesses or loopholes in this Court's formulation of public forum doctrine. It is not necessary to clarify or reform that doctrine to reverse the judgment below. But clarification could avoid similar difficulties in future litigation.

It is by now familiar doctrine that this Court's free speech cases recognize three kind of fora. The first is "property that has traditionally been available for public expression." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Second is "the designated public forum," property that is a forum because the government said so. *Id.* Third is the nonpublic forum on "all remaining public property." *Id.* at 678-79.

A designated forum may be limited by subject matter or speaker identity. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). A nonpublic forum may be open to selected private speakers. *Id.* Thus in both designated and nonpublic fora, government has substantial power to pick and choose who will be permitted to speak and what they will be permitted to discuss. Of course this power is not unlimited. Viewpoint discrimination is forbidden in any kind of forum. *ISKCON v. Lee*, 505 U.S. at 678-79. And so long as a

designated forum remains open, government must have a compelling reason for excluding a speaker who falls within the forum's designated limits. *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998). But government can exclude unwanted speakers by further restricting the designated subject matters or classes of permitted speakers, or by closing the designated forum entirely. And under current doctrine, these forms of restriction are largely exempt from judicial review.

The most troubling thing about the Court's three-category formulation is that censorship can become self-justifying in the second and third categories. The government's desire to exclude a speaker may be justified by showing its intent to close or limit the forum, and that intent may be shown by evidence that it has excluded other speakers in the past. A choice to close or limit a designated forum is not constrained by any requirement that all speech or speakers be treated equally, nor by any requirement that there be functional reasons for designating certain subject matters or classes of speakers. Outside the traditional public forum, the only real protection is that exclusion of speech must be reasonable and not based on viewpoint discrimination. *See generally* Laycock, 81 Nw. U.L. Rev. at 45-50.

Of course decisions to limit or close a designated forum often do have functional reasons, but the Court's doctrine does not appear to require such reasons. The Court has been sensitive to the need to preserve government property for its intended functions, and speech that disrupts those functions may be excluded. *See Forbes*, 523 U.S. at 672-76; *Cornelius*, 473 U.S. at 804. The Court has

recognized that if it overrides legitimate functional concerns, government may close a forum altogether, resulting in less speech rather than more. *Forbes*, 523 U.S. at 680-82.

In addition to avoiding disruption of governmental functions, fora are commonly limited as a means of rationing scarce resources, as in *Forbes*, or to set the agenda for a focused discussion, as in a journal, website, or conference devoted to a particular topic. Fora may be limited to speakers associated with the government institution that operates the forum, as when college campuses operate a forum only for students, faculty, and staff. The Court's forum doctrine avoids interfering with such functional distinctions, and undoubtedly the Court formulated the doctrine with such functional distinctions in mind.

But as this case illustrates, the current doctrinal formulation invites much more. Even without closing a designated forum, government may manipulate or gerrymander the limits on the forum to exclude undesired speakers. Milford has no functional reason for excluding religious subject matter save its hostility to religion or its mistaken view of the Establishment Clause. There is no claim of a need to ration scarce space – and even if there were, space could not be rationed on a ground so closely allied to viewpoint. *See Rosenberger*, 515 U.S. at 835. There is no claim of a narrow focus to which religion or moral instruction is simply irrelevant; the forum is open to substantially all secular community groups. Milford excludes the subject matter of religion by fiat, without offering any plausible reason. By excluding the subject matter of religion, Milford wholly excludes many religious viewpoints, and severely limits the

expression of all religious viewpoints. It is futile for the Court to closely scrutinize viewpoint discrimination if it gives carte blanche to subject matter discrimination and permits subject matter to be defined in ways that closely track viewpoint.

The problem is not confined to religious speech, or even to subject matters that are themselves a prolific source of viewpoints. In at least two frequently recurring ways, subject matter exclusions have powerful viewpoint consequences. First, the exclusion of any controversial subject matter insulates the status quo from criticism. Speakers who would defend the status quo have no need to do so if all speakers who would criticize the status quo have been silenced by a subject matter exclusion. Second, speakers who believe that a particular subject matter is unimportant and unworthy of public comment are unaffected by an exclusion of that subject matter; the effect of the ban falls only on speakers who hold the opposite viewpoint, and think that the subject matter is important.

To prohibit discussion of race relations, even in the Deep South in 1954, would be a mere subject matter exclusion, requiring no justification in designated fora under this Court's current doctrine. Similarly today, to prohibit discussion of race relations is to insulate those who are satisfied with the current degree of racial progress and to silence all those who think either that we have gone too far or that much more remains to be done. To prohibit discussion of animal rights, or sodomy laws, or estate taxes, or the electoral college, is to prevent any criticism of an entrenched status quo, and to silence a minority that vigorously disagrees with that status quo. To prohibit any discussion of the candidates for school

board is to insulate incumbents from criticism and to silence those who want a change. To prohibit all discussion of political issues is a subject matter exclusion that insulates the status quo across the board, on all these more specific topics and many others.

A subject matter exclusion of religion has all these vices. It tends to insulate the religious status quo in the community, whatever that status quo may be. It enacts the viewpoint of those who think religion is a purely private matter, inappropriate for public discussion, and suppresses the viewpoint of those who think religion is a vitally important topic. It suppresses religious viewpoints on every issue before the community. And the history of misunderstanding or evasion of this Court's rule protecting religious speech illustrates that those who would exclude a viewpoint can adjust or gerrymander definitions of subject matter to achieve their goals.

The Court need not solve these problems to decide this case. In this case, it is sufficient to hold that Milford has indeed discriminated on the basis of viewpoint. The solution to the underlying problem lies in refining the rules concerning the three kinds of fora on government property. Subject matter exclusions often serve important functional purposes; I do not propose that they be banned or even that they be equated with viewpoint discrimination. But they must be subject to some degree of judicial review.

In *ISKCON v. Lee*, 505 U.S. 672 (1992), four justices proposed entirely abandoning the rules that let government designate the status of various fora. *Id.* at 693-703 (Kennedy, J., concurring). That opinion proposed instead that the Court classify government property as public or

nonpublic fora based on functional criteria. The most important criterion would be whether the proposed speech would disrupt the normal functions to which the government property is dedicated.

That concurring opinion recognized the most fundamental defect of existing forum doctrine: that it "grants the government authority to restrict speech by fiat." *Id.* at 694. The opinion continued:

> [Under the Court's forum analysis,] the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there.

Id. at 695. The Court should reconsider the fundamental wisdom of that concurring opinion. In this case, the Good News Club no more interferes with the normal functioning of the school than do the Boy Scouts or any other club.

There is also a smaller step that would help considerably. The Court could retain the current structure with its three kinds of fora, giving presumptive effect to the government's designation. But the government's designation would be reviewable. Limitations imposed on a designated forum, and closures of designated fora, should not be wholly insulated from judicial review. Government should have to give some functional reason for limits on a designated forum. These reasons would *not* have to rise to the level of a compelling interest. Intermediate scrutiny, or even rational basis scrutiny that is not wholly toothless, would eliminate many arbitrary limitations on

the scope of fora. Government should not be able to exclude a subject matter for no better reason than its dislike of viewpoints or controversies associated with that subject matter or its misunderstanding of the law. Direct review of such motives would be unworkable, but requiring some functional reason would do much to solve the problem.

The current formulation of doctrine already provides that restrictions on speech, even in nonpublic fora, must be reasonable. *Cornelius*, 473 U.S. at 806. At the very least, the Court should give meaningful content to that requirement and make clear that it also applies to limitations on the scope of a designated forum. In this case, Milford's exclusion of religious speech is not reasonable. There is absolutely no reason for the exclusion except hostility to religious viewpoints or a misunderstanding of the Establishment Clause. Neither of these reasons is legally cognizable. One is constitutionally forbidden; the other is an error of law to which courts should not defer. This Court should not continue with a doctrine that authorizes governments to exclude whole subject matters from public places without having to offer any reason.

III. Permitting the Good News Club to Meet Would Not Violate the Establishment Clause.

Permitting the Good News Club to meet in a designated public forum on equal terms with secular clubs would not establish religion. This Court has repeatedly rejected claims to the contrary. *Rosenberger*, 515 U.S. 819 (1995); *Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel*, 508 U.S. 384 (1993); *Mergens*, 496 U.S. 226 (1990); *Widmar*, 454 U.S. 263 (1981); *see generally* Part I of this brief. This principle

is of course far more controversial when applied to distribution of government funds, but that controversy is not implicated here.

This case is the Court's first encounter with a designated forum in an elementary school, but that does not change the principle or the result. The age of the children may be a reason not to create a forum in the first place; certainly it is a reason to require each group participating in the forum to have adult leadership. But the age of the children does not justify viewpoint discrimination.

The conventional argument for excluding religious speech is that children are too young to understand the difference between government speech and private speech, and will mistakenly assume that the school endorses any religious speech that it permits. Let us first put this argument in context. It does not negate the viewpoint discrimination inherent in excluding private religious speech from the designated forum, and it does not claim that government actually endorses religion by any method ever recognized in this Court's cases. Rather, it is an attempt to justify *actual* viewpoint discrimination on the basis of fears that students may *mistakenly* perceive endorsement.

The claim of an establishment clause violation starts with an empirical claim: that elementary students cannot understand that the Good News Club is independent of the school. This is a dubious proposition empirically, and the school has made no effort to prove it. Nor has it tried to dispel any such confusion by explaining to children that the Good News Club is acting entirely on its own.

Viewpoint discrimination requires compelling justification, not a speculative assertion about what some children might misunderstand if no adult explains anything to them.

The proposition to be explained to the children is not difficult. The central point is simply that government does not endorse everything it fails to censor. Even the youngest children can understand that they have to go to school but they do not have to go to any after-school club. The school is supposed to be neutral concerning the Good News Club. Neutrality may be an abstraction, but a teacher can easily convey that abstraction in terms young children can understand: *I don't care*. "I don't care whether you go to the Good News Club or not. That is up to you and your parents." Or: "Mrs. Fournier doesn't work for the school. The Good News Club is more like a church. It just borrows a room at the school."

More fundamentally, the establishment clause argument does not depend on the children's level of understanding. The argument that children cannot understand first amendment rights would be untenable even if it were empirically true. It is untenable because it leads to an insoluble contradiction.

If students cannot understand that toleration of the Good News Club is not necessarily an endorsement of religion, then they cannot understand that exclusion of the Club is not necessarily a statement of hostility to religion. Milford defends a rule that on its face permits almost any community group to meet at the school so long as it is not religious. This facial viewpoint discrimination conveys a message of hostility that is far more real than any mistaken implication of endorsement that some

student might draw from mere equal treatment. Any attempt to explain away that apparent hostility would depend on a first amendment argument considerably more complicated than the simple proposition that the school does not endorse everything it fails to censor. And on Milford's hypothesis, the children would be incapable of understanding its explanation that it is not really hostile to religion.

The argument that children will think the school endorses religion unless it censors all religious speech on campus is like an argument sometimes heard from the other side of the school-prayer wars – that children will think the school opposes religion unless it teaches religion itself with classroom prayer. Both sides in this long running battle make the same mistake. Both sides say that if the school is not visibly for them, it is against them. Both sides say that neutrality will be interpreted as supporting the other side.

Each side seeks to allocate all risk of uncertainty or misunderstanding to the other. Each side seeks to protect its preferred right – free speech or disestablishment – with prophylactic rules so generous that no human deviation from those prophylactic rules will ever risk violating the constitutional right itself. Neither side can have all that it seeks. When each side's proposed prophylactic rules invade the substantive content of the other's constitutional right, neither clause can enjoy a wide margin of safety.

A solution in which one side forfeits its rights and bears all the risk of student misunderstanding while the other side bears no cost or risk whatever is not a neutral solution. The risk of student misunderstanding can be

minimized by explanations, and any residual and unavoidable risk of misunderstanding must be shared. It is best shared by facially neutral rules in which the government takes no position on religion in its own speech and treats private religious speech exactly like private secular speech. The courts can review what government actually does; they cannot review what every observer might misunderstand. Whatever the risk that some students will perceive a designated forum as an endorsement of all groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows students to talk about anything except religion. *See* Laycock, 81 Nw. U.L. Rev. at 14-20.

This argument does not depend on the age of the children. Elementary school children may have less capacity to understand the premises of a designated forum, but they have the same lesser capacity to understand that exclusion of religion reflects the school's idea of disestablishment rather than hostility. The argument that students cannot understand still leads to the same contradiction and is still soluble by the same facially neutral rules. *See id.* at 51-52.

One branch of this Court's endorsement test "focuses upon the perceptions of a reasonable, informed observer." *Pinette*, 515 U.S. at 773 (O'Connor, J., concurring). This observer's perception must be based on something the government did. When the Court finds a violation of the Establishment Clause:

> This is not because of "transferred endorsement," or mistaken attribution of private speech to the State, but because the State's own actions . . . and their relationship to the private speech

> at issue, *actually convey* a message of endorsement.

Id. at 777 (O'Connor, J., concurring).

The "State's own actions" that convey this message may be subtle; in unusual cases, they may even be unintentional. But to plausibly be perceived as endorsement, *"the State's own actions"* must necessarily include some form of preferential treatment for religious speech – some special privilege, or some manipulation of process to ensure that the religious speaker gets an advantage. The non-mistaken impression of endorsement must be based on some government action, however subtle, that treats religious speech more favorably than other speech. Without that, the perception of endorsement is without basis, and the free speech rights of religious citizens are at the mercy of other peoples' misperceptions.

In this case, there is no ambiguity about what the school has actually done or about what it is being asked to do. What it has actually done is to exclude religious speech, because of its religious content, from a forum open to substantially all secular community groups. That is actual anti-religious discrimination, and it conveys an entirely accurate message of hostility to religious speech. What it is being asked to do is to admit a religious club to a designated forum on the same terms as secular clubs, and to let parents freely choose among clubs that teach morals and character development from either a secular or religious perspective. Such equal participation and parental choice convey no message of endorsement to any reasonable or informed observer. If a child misunderstands, the solution is to give that child an explanation –

not to use the child's mistake as an excuse for immediate resort to flagrant viewpoint discrimination.

Because there is no unequal treatment, there is no reasonable perception of endorsement, and there is no violation of the Establishment Clause.

CONCLUSION

The judgment should be reversed, and the case remanded for entry of an injunction prohibiting further exclusion of religious speech from the designated forum at Milford Central School. This Court should disapprove the Second Circuit's mistaken doctrine that exclusion of religious speech from public fora is often or sometimes a mere subject matter exclusion and not a form of viewpoint discrimination.

Respectfully submitted,

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IN THE
Supreme Court of the United States

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE AMERICAN MUSLIM COUNCIL, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL BOARD OF CHURCH & SOCIETY OF THE UNITED METHODIST CHURCH, AND THE A.M.E. ZION CHURCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a policy that generally permits members of the community to use public facilities after school hours for educational, social, civic, and recreational purposes, but excludes any person or group that desires to use school facilities for religious purposes, violates the First Amendment's protection for free speech.

2. Whether such a policy violates the First Amendment's protection for the free exercise of religion.

3. Whether a government policy requiring public officials to draw fine distinctions between "religious instruction" and "discussion of moral issues from a religious viewpoint" violates the Establishment Clause of the First Amendment.

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INTERESTS OF *AMICI CURIAE*

Amici are a diverse group of churches and other religious organizations that conduct religious activities, hold worship services, or otherwise assemble at public facilities. Sometimes *amici* rent a public facility for use by a congregation that is new or whose usual meeting place is under renovation. At other times they may use such a facility for community outreach and education, *e.g.*, Bible study seminars, healthful living programs, and family life presentations.

In so doing, *amici* seek no special favors. Nor do they seek to use these facilities in a way that ignores legitimate concerns about the fact or appearance of a religious establishment. What they seek, instead, is equal access, *i.e.*, access on the same terms as other community groups, and provided in a way that respects the need for an appropriate separation between church and State.[1]

STATEMENT

This case resurrects an issue that *amici* and most other religious groups thought had been laid to rest in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993): whether a State can exclude religious programs from public facilities that are otherwise available for a broad range of similar, but secular, programs and events. In *Lamb's Chapel*, this Court unanimously ruled that such exclusions violate the free speech rights of religious groups

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[1] A complete list of *amici*, with descriptions of each organization's interest in this litigation, is set forth in a more detailed Statement of Interest of *Amici Curiae* appended to this brief. Petitioners and Respondents have consented to the filing of this brief in letters that are being filed with the Clerk's office. The undersigned counsel alone have authored this brief, and no person or entity other than *amici* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.

and are not required by the Establishment Clause. *Id.* at 395-97.

Amici assumed this ruling and its reasoning would prevent State officials from denying religious groups access to public facilities on the same terms as other community groups. Unfortunately, using a crabbed interpretation of *Lamb's Chapel*, some public officials and courts have systematically prohibited churches and other religious associations from holding programs in otherwise widely available public facilities.

The leading decision is *Bronx Household of Faith* v. *Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997). There, the court held that such discrimination against religious groups can be justified on the ground that most programs run by churches do not present a religious "viewpoint" on a secular subject, but instead amount to "religious instruction or worship," which can be excluded on the basis of its "content."

The *Bronx Household* view has sprouted disturbing tendrils in at least two other circuits, where courts have approvingly cited the decision in excluding religious groups from publicly available facilities. *Campbell* v. *St. Tammany's Sch. Bd.*, 206 F.3d 482, 486 (5th Cir. 2000); *DeBoer* v. *Village of Oak Park*, 86 F. Supp. 2d 804, 810 (N.D. Ill. 1999). Rather than diminishing discrimination against religious groups' use of public forums, the *Lamb's Chapel* ruling has only caused public officials in these circuits to become more adept at excluding religiously-oriented programs.[2]

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[2] *Accord Saratoga Bible Training Instit.* v. *Schuylerville Cent. Sch. Dist.*, 18 F. Supp. 2d 178 (N.D.N.Y. 1998) (denying one-time use of high school auditorium for an "Answers in Genesis" Bible and science seminar); *Full Gospel Tabernacle* v. *Community Sch. Dist. 27*, 979 F. Supp. 214 (S.D.N.Y. 1997) (denying church's request to rent public school for Sunday services for one month).

To be sure, the dubious distinctions of *Bronx Household* have not been accepted by a number of circuits, which have prevented religious groups from being singled out for exclusion from public forums.[3] But, in a number of States, the *Bronx Household* approach jeopardizes the rights of religious persons and groups—whose members are, in general, taxpaying citizens of the States and communities in which they live—to use public facilities on an equal basis with similarly situated, yet secular, groups. It is high time to dismantle that approach and to reinforce the equal access principles of *Lamb's Chapel*.

SUMMARY OF ARGUMENT

The *Bronx Household* approach, which effectively excludes religion *per se* from public facilities, violates the Constitution for three separate reasons. First, it violates free speech principles. The exclusion of views based on their religious content is, in both principle and practice, a form of impermissible viewpoint discrimination. And because religion is a suspect constitutional class, it cannot be used, as it is in the *Bronx Household* doctrine, to define a categorical line of exclusion from a public forum. This is true whether the school facilities at issue are viewed as a limited public forum, as they were below, or as a designated full public forum for after-hours usage, as this Court's precedent would suggest.

Such an exclusion, moreover, is not justified by the Establishment Clause. Under a properly designed use policy, there will easily be enough separation between a religious group's activities and those of the public school to avoid, not

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[3] *Grace Bible Fellowship* v. *Maine Sch. Admin. Dist.*, 941 F.2d 45 (1st Cir. 1991); *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Fairfax Covenant Church* v. *The Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994); *Good News/Good Sports Club* v. *School Dist.*, 28 F.3d 1501 (8th Cir. 1994); *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996).

only State support for religion, but any message of endorsement. If anything, the *Bronx Household* approach itself infringes the Establishment Clause by sending an improper message of State hostility towards religion.

Second, the *Bronx Household* approach violates the Free Exercise Clause. It does so by specifically targeting religious activity for inferior treatment without any compelling interest or attempt to tailor the governmental policy to such an interest. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993); *Employment Div.* v. *Smith*, 494 U.S. 872, 878 (1990). Moreover, the *Bronx Household* approach impermissibly burdens religious exercise in combination with other constitutional rights, including free speech and associational rights.

Third, not only are policies such as the one at issue here not *justified* by the Establishment Clause, but they also directly *violate* that Clause. Specifically, they impermissibly entangle church and State by requiring school officials to draw dubious and arbitrary distinctions between "religious viewpoint" and "religious instruction or worship."

Accordingly, the decision below should be reversed, and the *Bronx Household* doctrine rejected in favor of an approach that respects the constitutional right of religious people—whose taxes also pay for public facilities—to use public property on equal terms with other taxpayers, while complying with the legitimate constraints imposed by the Establishment Clause.

ARGUMENT

Our Nation has a rich tradition of providing religious groups with equal access to public facilities—a tradition that no doubt reflects the fact that the religious, no less than the irreligious, contribute to the support of those same facilities. Throughout our history, for example, communities have regularly allowed public schools to be used after hours for

religious purposes.[4] Indeed, this tradition is reflected in a once-popular television show, *Little House on the Prairie*, which regularly depicted Sunday church services being held in the community's one-room school.

The school policy at issue here departs from that tradition. As shown below, it does so in a way that flatly violates three separate provisions of the First Amendment: the Free Speech Clause, the Free Exercise Clause, and the Establishment Clause.

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[4] *See, e.g., Nichols* v. *School Dirs.*, 93 Ill. 61, 62, 64 (1879); *Davis* v. *Boget*, 50 Iowa 11, 15 (1878); *see also Southside Estates Baptist Church* v. *Board of Trs.*, 115 So. 2d 697, 698, 700-01 (Fla. 1959) (permitting public school to be "used temporarily as a place of worship during non-school hours"); *South San Antonio Indep. Sch. Dist.* v. *Martine*, 275 S.W. 265, 266 (Tex. Civ. App.) (indicating public school trustee permitted facilities to be used for "sectarian, political, and religious purposes"), *writ of error refused*, 277 S.W. 78 (Tex. 1925) (stating that petition failed to disclose an actionable abuse of discretion by school trustee); *State ex rel. Gilbert* v. *Dilley*, 145 N.W. 999, 999-1000 (Neb. 1914) (permitting occasional use of a schoolhouse as a place of worship on Sundays); *Hurd* v. *Walters*, 48 Ind. 148, 150 (1874) (noting that township act opened the schoolhouse "for other purposes than common schools" provided there are "equal rights and privileges to all religious denominations and political parties"); *State* v. *Kessler*, 117 S.W. 85, 85 (Mo. Ct. App. 1909) (noting that State statute "authorizes the use of schoolhouses 'for religious, literary or other public purposes'").

This has been true even in States with establishment clauses more restrictive than that in the U.S. Constitution. *See, e.g., Nichols*, 93 Ill. at 62-64 (permitting equal access where State constitution "forbid[s] . . . paying from any public fund whatever anything in aid of any church or sectarian purpose"); *Davis*, 50 Iowa at 15 (permitting equal access where State constitution provides no "person [shall] be compelled to pay tithes, taxes, or other rates for building or repairing places of worship"); *see also Southside Estates*, 115 So. 2d at 698-701; *Gilbert*, 145 N.W. at 999-1000.

I. THE EXCLUSION OF RELIGIOUS INSTRUCTION OR WORSHIP FROM PUBLIC FACILITIES OTHERWISE OPEN TO COMMUNITY GROUPS VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE.

This Court has long held that religious speech is owed the same constitutional protections and rights as secular speech.

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince.

Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

As applied to the States through the Fourteenth Amendment, the First Amendment's Free Speech Clause generally requires that States justify any restriction on the content or viewpoint of private speech in a "traditional public forum" by showing that the regulation in question "is necessary to serve a compelling State interest and is narrowly drawn to achieve that end." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998) (quoting *Perry Educ. Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)). Restrictions as to time, place, and manner of expression in such a forum must be content neutral, narrowly tailored to serve a significant government interest, and "leave open ample alternative channels of communication." *Perry Educ. Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (citations omitted).

This same standard also applies to public property that is not traditionally a public forum, but has been designated as such when a State, either "by policy or by practice," opens it

up to the public as a place for expressive activity. *Cornelius* v. *NAACP Legal Def. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n*, 460 U.S. at 45. The government can limit such designated forums to certain classes of speakers or subject matter—thereby creating a "limited public forum"—as long as the limits are "reasonable and not an effort to suppress . . . the speaker's view." *Id.* at 46. However, if a government "excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Forbes*, 523 U.S. at 677.[5]

Both parties in this case have assumed that the Milford Central School ("Milford") is a limited public forum. (Pet. App. C12.) Thus, we first evaluate Milford's Community Use of School Facilities policy ("Policy") under the limited public forum doctrine. We then show that Milford has in fact created a full public forum for after-hours usage, and why its Policy violates the First Amendment under a full public forum analysis. Finally, we show why the exclusion of religious instruction or worship, under either of these standards, is neither required nor justified by the Establishment Clause.

A. Under The Principles Governing A Limited Public Forum, Milford Cannot, Absent A Compelling Interest Not Present Here, Use Religion As A Criterion To Define A Class Or Category Of Excluded Content.

Even analyzed under the less restrictive standards of a limited public forum, where classes of speech may be excluded on reasonable, viewpoint-neutral grounds, Milford's Policy

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[5] The Court has also defined a third category of public property forum known as the "nonpublic" or "selective access" forum. *Forbes*, 523 U.S. at 679-80. Here, however, no claim is made by either side, or in any lower court opinion, that Milford's access policy has turned its facilities into a non-public forum. Neither would evidence in the record appear to support such a claim if it were made.

violates the First Amendment. This is so for two independent reasons.

1. The exclusion of the Good News Club is in fact viewpoint discrimination. Other youth clubs that focus on morality and character building—including the Boy Scouts, the Girl Scouts, and the 4-H Club—are given access to the School's facilities. (Pet. App. A3.) Milford cannot keep out the Club merely because it addresses these same topics from a religious view.

To be sure, the *Bronx Household* approach attempts to justify such discrimination on the ground that it is based on content, not viewpoint, discrimination. But this distinction rests on a logical fallacy that posits that secular instruction and sectarian instruction must be two separate categories of content and cannot be two viewpoints on a similar topic.

The Tenth Circuit exposed the flaw in this reasoning in *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). In that case, city-owned senior centers prohibited sectarian instruction within their facilities. The city defended the policy by arguing that it was viewpoint neutral, and that it excluded religion as a class of content and not as a viewpoint.

In rejecting this contention, the Tenth Circuit ruled that "any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint." *Id.* The court explained that "instruction becomes 'sectarian' when it manifests a preference for a set of religious beliefs." *Id.* It concluded that "because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), *a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.*" *Id.* (emphasis added). Milford's restriction against religious instruction is similarly unconstitutional. Aside from its prohibition on religious instruction, it otherwise allows for "instruction in any branch of education," (Pet. App. D1),

thereby favoring secular instruction and viewpoints over religious ones.

The Fifth Circuit has noted as much. In commenting on this very case and the Milford Policy, it noted that "there is a powerful argument that such a prohibition against the use of facilities for a religious purpose is facially invalid as inevitably presenting a viewpoint discrimination." *Campbell* v. *St. Tammany Parish Sch. Bd.*, Nos. 99-31071, 99-31140, 2000 WL 1597749, at *17 (5th Cir. Oct. 26, 2000).

2. Even if Milford were able to articulate some coherent way of defining religion as content and not as a viewpoint, its Policy would still run afoul of the Free Speech Clause. That is because the government cannot define lines of exclusion by reference to a constitutionally-protected class—in this instance, that of religion. Such a definition amounts to an "elementary violation" of the First Amendment. *Grace Bible Fellowship* v. *Maine Sch. Admin. Dist.*, 941 F.2d 45, 48 (1st Cir. 1991) (noting that exclusion of religious groups from a public forum violates First Amendment).

To be sure, in a limited public forum public officials can regulate speech content with rules that are "reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). But, short of enforcing a compelling State interest, can a forum regulation ever be constitutionally "reasonable" if it draws a line of exclusion that is defined exclusively by reference to a constitutionally-suspect class?

This question is easily answered by considering a few examples. Under the Constitution, could a State official "reasonably" set up an expressive forum that was widely available to community groups or programs, excluding only groups of African-Americans, Native-Americans, or Irish-Americans? Could the State "reasonably" create a rule that excluded only programs run by, or that highlighted issues uniquely affecting, women? Absent something considerably

more than a rational basis, the government cannot single out such groups for exclusion. See *United States* v. *Virginia*, 518 U.S. 515, 546 (1996) (invalidating Virginia's "categorical exclusion" of women from the Virginia Military Academy because the State fell "'far short of establishing the "exceedingly persuasive justification"' that must be the solid base for any gender-defined classification") (internal citation omitted); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (concluding that anti-miscegenation statutes "rest solely upon distinctions drawn according to race" and are therefore unconstitutional); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (invalidating laws requiring and permitting racial segregation in public schools).

If any constitutionally-protected group is to be excluded from a limited public forum, it must be on the basis of constitutionally-neutral criteria that sweep more widely than any particular protected class. For example, a school could limit the use of its facilities to youth-oriented activities. While such a policy would exclude programs held by or for adult women, it would do so based on constitutionally-neutral criteria that also would exclude a wide range of unprotected groups, such as the Rotary club, the community garden club, or the local political forum. Similarly, a school could limit the after-hours use of its facilities to political activities. In such cases, programs dedicated to addressing gender issues or racial issues would be excluded, except to the extent that those programs also sponsored political activities.

But Milford has not used constitutionally-neutral criteria to exclude a general class of programs that simply happens to include religious programs. Rather, it has used the constitutionally-protected class of religion itself to define the line of exclusion.[6]

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[6] The Policy does so in two places. First, it starkly and globally forbids any use of school premises for "religious purposes." (Pet. App. D2.) No attempt is made to include religion with a number of other excluded uses or categories—the exclusion is made on the basis of religion alone.

Second, paragraph four, which allows for "meetings" and "events" charging admission fees, explicitly excludes such programs if held by a "religious sect or denomination." (Pet. App. D1.) While other secular organizations are also excluded under this section, the law on which the section is modeled, N.Y. Educ. Law § 414, excludes only religious groups from holding fundraising events. (Pet. App. C4-C5.) Neither version can be "reasonable" as a constitutional matter because they both draw an exclusionary line along the boundary of a constitutionally-protected class, albeit at varying levels of sophistication.

Under *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993) ("*Lukumi*"), "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546. Thus, religion is a protected constitutional class that is necessarily entitled to the highest protection from laws that target religion for inferior treatment. *Id.* at 534 (condemning the use of "[o]fficial action that targets religious conduct for distinctive treatment"); see also *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (state law disqualifying the clergy from public offices invalid because it imposed special disabilities on the basis of religious status).

Thus, any policy that singles out religion for exclusion cannot be "constitutionally reasonable," short of being justified by a compelling State interest. The only such interest that has been suggested in this context is the Establishment Clause. For the reasons articulated below, however, the Establishment Clause neither mandates nor justifies the Milford Policy or others like it.

B. Under The Principles Governing A Designated Full Public Forum, Milford Cannot, Absent A Compelling Interest That Is Not Present Here, Exclude Religious Groups Based On Either Viewpoint Or Content.

The Milford Policy also runs afoul of the requirements applicable to full public forums. In commenting on an access policy based on the same statutory scheme at issue here, this Court in *Lamb's Chapel* agreed there is "considerable force" to the argument that such regulations create a designated public forum. *Lamb's Chapel*, 508 U.S. at 391 (commenting on the uses permitted under N.Y. Educ. Law § 414).[7]

State officials can designate a public forum either "by policy or by practice." *Perry Educ. Ass'n*, 460 U.S. at 47. If a combination of "policy and practice" indicates that the government has opened up a public property to "the public at large for assembly and speech," the forum should be treated the same as a traditional public forum. *Cornelius*, 473 U.S. at 802.

Cornelius describes precisely the situation here. Milford has granted access to a number of other youth groups with purposes similar to that of the Good News Club. For example, the Boy Scouts, the Girl Scouts, and the 4-H Club all strive to inculcate values, morals, and even spiritual principles. (Pet. App. A12.) Further, the Milford superintendent testified that a wide range of community groups would be allowed to use school facilities for a variety of purposes, including political debates, Christmas programs, movie screenings, and moral instruction through literature such as Aesop's fables. (Pet. App. E4-E5.)

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[7] The Court did not have to decide that question in *Lamb's Chapel* because it found the restrictions at issue invalid even under the limited public forum standard.

Although a wider range of groups had used the facilities at issue in *Lamb's Chapel* than have used the facilities in this case, that fact is more than offset by Milford's adoption of a written access policy that is substantially broader than its counterpart in *Lamb's Chapel*. 508 U.S. at 391 n.5. Milford's Policy allows secular groups to use its facilities for seven of the purposes set out in N.Y. Educ. Law § 414. (Pet. App. D1-D2.) The school in *Lamb's Chapel* had adopted only two of those categories. *Lamb's Chapel*, 508 U.S. at 387. Beyond the "social, civic and recreational and entertainment events" authorized by the schools in both cases, Milford expressly allows for "instruction in any branch of education, learning or the arts." (Pet. App. D1-D2.) It also allows for "meetings [and] entertainment events." *Id.*

There are, moreover, no exclusions as to program content or subject matter, except of course as to religion. Because the Policy excludes religion from the forum, Milford officials appear to believe that the facilities qualify as only a limited public forum. But this cannot be correct. As the First Circuit remarked in a similar case, the fact that within the forum "anyone could be promoted except Jesus, [and] that all religions were excluded, did not mean that a broad access forum" became a "legally limited" forum. *Grace Bible Fellowship*, 941 F.2d at 47. Such an exclusion is not a reasonable regulation governing the use of a limited forum. Rather, it is nothing less than unconstitutional government "censorship." *Id.* at 48.

Indeed, the category of a designated public forum would lose all meaning if a State were able to change a full public forum into a limited forum merely by excluding one class of speech. The very idea of a designated general public forum is that the State cannot discriminate as to content without a compelling State interest. *Perry Educ. Ass'n*, 460 U.S. at 47. It is one thing for a State affirmatively to open a forum for a limited purpose or purposes, such as youth programs, or political debates, or civic business. But surely it cannot do

the reverse: open a forum for nearly all purposes and topics, exclude only a few topics—or one topic, as it has done here—and then expect the forum to be treated as a limited public forum. "Were it otherwise, a public body could unilaterally narrow a designated public forum so as to exclude disfavored groups, cynically circumventing the Supreme Court's public forum jurisprudence." *Campbell*, 2000 WL 1597749, at *26 (Jones, J., dissenting). Courts should not tolerate "[s]uch obvious machinations." *Id.*

Accordingly, this Court should hold that N.Y. Educ. Law § 414 and the Milford Policy create a general, open public forum for after-hours usage. The Court should also rule that the government cannot engage in viewpoint or content discrimination absent a compelling interest, which has not been asserted here.

C. The Establishment Clause Does Not Provide A Basis To Exclude Religious Instruction Or Worship Because, Under A Neutral And Properly Implemented Facilities Use Policy, Milford Neither Supports Nor Endorses Religion.

Establishment Clause concerns cannot justify the exclusion of a religious subset of taxpayers from equal access to their public facilities. As noted above, it has long been a common practice to allow religious groups to conduct services and meetings in public schoolhouses, even in States with restrictive State constitutional establishment clauses.[8] That practice

[8] *See* cases cited *supra* note 4; *see generally* C.T. Foster, Annotation, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R. 2d 1148, 1150 (1961 & 2000 Supp.) ("In pioneer times and during the era of the one-room country schoolhouse . . . it probably was not at all unusual, in many rural and village areas, for the residents of the neighborhood to use the public schoolhouse as a meeting place for many community nonschool purposes, during nonschool time. Sometimes the school building was used for holding Sunday church services or Sunday school meetings, or for evangelical or other religious meetings in the evenings, often because it was the only available building or hall in the community which could accommodate such a gathering.")

is fully consistent with the approach set out in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), under which the State must act with a secular purpose, its acts cannot have the primary effect of advancing or inhibiting religion, and it cannot act in a way that produces excessive entanglement between church and State.[9]

As to the first requirement: allowing public buildings to be used on the same terms as non-religious uses is not an impermissible legislative purpose. This Court long ago held that the creation of a public forum has a secular purpose, even if religious speech is allowed in that forum. *Board of Educ.* v. *Mergens*, 496 U.S. 226, 248 (1990); *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981). And, more generally, accommodating religion is also an acceptable secular purpose. See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987) (holding that a Title VII statutory provision that accommodates religion has a legitimate secular purpose); *accord Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Wisconsin* v. *Yoder*, 406 U.S. 205, 235 n.22 (1972); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). Moreover, as shown below in Section III, the policy at issue here does not avoid entanglement; it creates it.

Thus, if Milford's Policy is to be justified by Establishment Clause requirements, it can only be because of the *effect* that a contrary policy might have in advancing religion. But a properly crafted use policy would not have impermissible effects, and thus there is no Establishment Clause justification

[9] More recent decisions have tended to merge the last prong with the second prong, and the question of whether the government "endorses" or reasonably appears to "endorse" a religion has emerged as a key element of the second prong, especially in cases dealing with private speech in public or limited public forums. *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see Capitol Square Review*, 515 U.S. at 774-75; *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990).

for Milford's Policy or for the underlying *Bronx Household* approach. See *Fairfax Covenant Church* v. *The Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994) (Establishment Clause does not justify policy excluding religious groups from public school facilities); *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366, 1380 (3d Cir. 1990) ("[G]ranting a religious organization permission to use school facilities does not imply an endorsement of religious goals.").

1. First, it is well settled that any benefit a religious group receives from equal access to a public forum is only "incidental" and does not "violate the prohibition against the 'primary advancement' of religion." *Widmar*, 454 U.S. at 273 (access to public university open forum only incidentally benefits religious student groups); *Mergens*, 496 U.S. at 248 (equal access to secondary school facilities does not impermissibly advance religion). This is because of the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

In defending their Policy and the *Bronx Household* line of cases, Respondents ignore this crucial distinction. They rely heavily on reasoning drawn from cases involving *government actors* directly engaged in religious speech,[10] religious instruction occurring on school grounds *during the school day*,[11] and prayers at programs officially sponsored and run by *school officials*.[12] (Resp. Br. 8-10.) This case, however, is about *private actors* engaging in religious speech in a public forum *after the school day* at programs sponsored and run by a *private community group*. (Pet. App. E1-E2, H1-H2.)

[10] *Engel* v. *Vitale*, 370 U.S. 421 (1962).

[11] *McCollum* v. *Board of Educ.*, 333 U.S. 203 (1948).

[12] *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Lee* v. *Weisman*, 505 U.S. 577 (1992).

Merely making a public forum available to the Good News Club for *private* religious speech does not amount to unconstitutional "support" for religion. *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 248; *Widmar*, 454 U.S. at 273.[13]

2. Nor would the Good News Club's proposed use violate the endorsement test set forth by the concurrence in *Capitol Square Review*, 515 U.S. at 777, 780. This test examines a number of factors to decide if the State's relationship to private religious speech would convey endorsement to a well-informed, reasonable observer. These factors include whether a religious group will "dominate a public forum," the "fortuity of geography," and the "nature of the particular public space." *Id.* at 777–78.

As to the first factor, absent some "empirical evidence that religious groups will dominate [an] open forum," a court cannot use forum domination to find State endorsement of religion. *Widmar*, 454 U.S. at 275. The "mere speculation" that use of a forum by a religious group over a period of time might "ripen into a violation of the Establishment Clause, absent any facts suggesting that probability, is not a justification sufficiently compelling to burden free access to the forum." *Fairfax Covenant Church*, 17 F.3d at 708.

In the present case, not only are the school facilities used by a number of different community-based youth groups, but they are also open to virtually all other types of community

[13] Indeed, a plurality in *Capitol Square Review* ruled that as long as forum access rules are truly neutral, "purely *private* religious speech connected to the State only through its occurrence in a public forum" can never offend the Establishment Clause. *Capitol Square Review*, 515 U.S. at 767. This neutrality approach to Establishment Clause concerns was recently supported by the plurality in *Mitchell* v. *Helms*, 120 S. Ct. 2530 (2000). The Good News Club's proposed use of Milford facilities would come well within this neutrality rule, as nobody has questioned the genuinely private nature of the Club's religious speech or the neutrality of its proposed access.

groups, except of course religious groups. There is no evidence or even claim that the Good News Club dominates, or is reasonably anticipated to dominate, Milford's facilities.

As to geography, nature of public space, and the time of the program: *Lamb's Chapel* gave four reasons why the display of a Christian film series in a public high school would not convey State endorsement. First, the film series was not shown "during school hours." Second, the showing was not "sponsored by the school." Third, the film series was "open to the public." Fourth, the school property had been used by "a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 395. The proposed Good News Club meetings satisfy all these criteria. A wide range of community groups use, or are eligible to use, the facilities. (Pet. App. E4-E5.) The Club's meetings are open to all interested children (provided they gain their parent's permission), irrespective of their personal creed or ideology. (Pet. App. E1-E2.) The Club's meetings are not sponsored or otherwise supported by the school, and no teachers or other personnel from the school attend the meetings. (Pet. App. E2.)

Further, The Good News Club proposed to use Milford's facilities at 3 p.m. (Pet. App. C3.) The concern over the timing of a religious event is greatly diminished when the event takes place "after instructional hours when student attendance is no longer compelled." *Good News/Good Sports Club* v. *School Dist.*, 28 F.3d 1501, 1510 (8th Cir. 1994).

While the record does not indicate precisely when the Milford school day ends, even if it ends near 3 p.m. there would still be a sufficient separation between school activities and those of the Club to avoid the appearance of the Club's meetings being part of the school day. "Nothing in the first amendment postpones the right to religious speech until high school, or draws a line between daylight and evening hours." *Hedges* v. *Wauconda*, 9 F.3d 1295, 1298 (7th Cir. 1993). Here, the combination of (1) the change of location, from classrooms to cafeteria; (2) the change of personnel, from

school teachers to outside leaders; and (3) the change of audience, with a mixing of grade levels and the addition of children from outside the school provides the necessary break between the school day and Club meetings to avoid the appearance of government endorsement.[14]

In applying the rigid *Bronx Household* approach, the lower courts made no real inquiry into the connection between the activities of the school and those of the Club. Under the reasoning below, the outcome would have been no different if the Club had met at 5 p.m., or 10 p.m., or on the weekends. Likewise, it would not have mattered if the Club's activities had been for toddlers, teenagers, or twenty-somethings. Under *Bronx Household*, the religious nature of the activity absolutely barred the Club's religious use of any Milford facility, at any time, for anyone. Such a rule plainly goes beyond the demands of the Establishment Clause.

3. Respondents' concerns about "captive" child audiences do not alter this conclusion. All of the children at the Good News Club meetings attend voluntarily, and with parental permission. (Resp. Br. 25; Pet. App. E2.) Moreover, the argument that an elementary-aged audience is less capable of distinguishing between State neutrality and State endorsement than the presumably older audience in the *Lamb's Chapel* case is unpersuasive for two reasons.

First, while the audience for the Christian film series in *Lamb's Chapel* was largely comprised of teens and adults, it is likely that younger children also attended those meetings.

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[14] *Amici*'s use of public facilities has an even more attenuated link to school-day events or regular government business than is present in this case. That is because the use of public forums by *amici* will occur primarily on the weekends or later in the evenings, far removed from the hours of traditional government activity. Absent forum domination or preferential treatment, this type of use by religious groups falls well inside the constitutional boundaries set out in *Capitol Square Review* and *Lamb's Chapel*.

The Court did not express concern that younger children would be uniquely influenced by the religious films shown in the public forum. Other courts have shown similar regard for the ability of young children to distinguish between State speech and private speech. *Good News/Good Sports Club*, 28 F.3d at 1509 (eleven to 15-year-olds capable of discerning that religious club's activities from 3-4 p.m. on school grounds were not State speech); *Hedges*, 9 F.3d at 1298 (junior high school students can see that religious literature handed out immediately prior to and after class is private rather than State-sponsored speech).

Second, the argument of youthful impressionability is a double-edged sword. It defies common sense to conclude that, while young children might view a religious organization's use of public property as an endorsement from the State, they would not also perceive the organization's *exclusion* from those facilities as State *hostility* toward religion. When members of the Good News Club see the Boy Scouts, the Girl Scouts, and the 4-H Club use school facilities after hours, but they are forced to meet elsewhere because their Club—by reason of its religious affiliation—cannot meet on public property, they will inevitably perceive that "they are outsiders, not full members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). This is precisely the type of State-sponsored message that is prohibited by the Establishment Clause.

4. Indeed, for children as well as adults, the primary effect of the Policy is not to avoid endorsement, but to "demonstrate . . . hostility toward religion." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (citing *Mergens*, 496 U.S. at 248). It is well settled that "[t]he Religion Clauses . . . provide no warrant for discriminating *against* religion." *Board of Educ.* v. *Grumet*, 512 U.S. 687, 717 (1994) (emphasis added).

Stated differently, a message of government hostility toward religion is no more constitutionally permissible than a message of endorsement. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement *or disapproval* of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added). As this Court explained in rejecting an Establishment Clause challenge to a policy allowing student religious clubs equal access to public high school facilities:

> [I]f a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but *hostility* toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

Mergens, 496 U.S. at 248 (1990) (emphasis added) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring)).[15]

Milford's Policy categorically excludes religious programs from its facilities. Thus, the Policy "foster[s] a pervasive bias or hostility toward religion," and thereby "undermine[s] the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 845-46. Therefore, contrary to the flawed reasoning employed by the courts below, the

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[15] Moreover, although States are forbidden from expressing messages of either endorsement or hostility toward religion, a message of hostility is arguably of greater constitutional concern. That is because it is prohibited not only by the Establishment Clause itself, but also by the Free Exercise and Free Speech Clauses, which collectively insulate religious belief, practice, and expression from official criticism by a State orthodoxy. As this Court noted nearly 60 years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can describe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

Establishment Clause neither mandates nor justifies the Policy.[16]

II. THE EXCLUSION OF RELIGIOUS INSTRUCTION OR WORSHIP FROM PUBLIC FACILITIES OTHERWISE OPEN TO COMMUNITY GROUPS VIOLATES THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

Policies such as that employed by Milford also violate the First Amendment's Free Exercise Clause. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").[17] Under this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), laws that are neutral towards religion and generally applicable may usually be justified by a "reasonable" government purpose, even if they burden religious practice. See *id.* at 879. In sharp contrast, however, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. The same is true of facially-neutral laws that burden other constitutional

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[16] If this Court nevertheless believes there is some question whether there is enough separation between the Club's meetings and the School, the Court should squarely reject the *Bronx Household* standard and then, if necessary, remand the case for adjudication under the proper standard.

[17] While Petitioners have focused on the free speech aspects of their First Amendment challenge, because the speech at issue here is religious speech, the resolution of this case necessarily implicates closely intertwined Free Speech, Free Exercise, and Establishment Clause jurisprudence. *See, e.g.*, *Mergens*, 496 U.S. at 250 (plurality opinion noting that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"). Further, this Court has previously considered arguments raised only in an amicus brief, *see, e.g.*, *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality) (deciding case on the basis of a claim that was "raised only in an amicus brief"). The Court should do the same here given the important free exercise principles at stake.

rights in addition to religious freedom. *Smith*, 494 U.S. at 878, 881, 882. Policies such as the one at issue here violate the Constitution's Free Exercise Clause because, with no legitimate justification, they (1) single out religion for inferior treatment and (2) burden the exercise of rights in addition to freedom of religion.

1. This Court has always regarded laws that single out religion with the deepest suspicion. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in the rarest cases." *Lukumi*, 508 U.S. at 546. As the Sixth Circuit noted, this Court "never intended *Smith* and *Lukumi* . . . to affect the methodology of dealing with those laws or rules that directly burden religion because they are not neutrally and generally applicable." *Hartmann* v. *Stone*, 68 F.3d 973, 978 (6th Cir. 1995). Laws that are not both neutral towards religion and generally applicable must be justified by "a compelling State interest and [must be] narrowly tailored to achieve that interest." *Lukumi*, 508 U.S. at 533; see *McDaniel*, 435 U.S. at 628-29.

In *Lukumi*, this Court found that local government restrictions on ritual animal sacrifice were neither "neutral" nor "generally applicable," as only religious animal killing was outlawed. *Lukumi*, 508 U.S. 536-37. Many other types of animal killing, including hunting and commercial slaughtering, were exempted from the regulations. *Id.* This Court concluded that no compelling interest had been shown, and thus struck down the regulatory scheme. *Id.* at 547.

In deciding whether a law is neutral towards religion, "we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at

533. It is beyond dispute that "a rule that uniformly bans all religious practice is not neutral." *Hartmann*, 68 F.3d at 978.[18]

In this case, the text of the Milford Policy directly targets religion for inferior treatment: "School premises shall not be used by any individual or organization for religious purposes." (Pet. App. D2.) "Religious purposes" are the only objectives excluded by the Policy, and—like the supporting N.Y. Educ. Law § 414—therefore fall directly under the *Smith* and *Lukumi* prohibition against laws that target religion for inferior treatment.

2. An alternative reason to apply the compelling State interest test is that the Milford Policy burdens a combination of rights. As this Court explained in *Smith*, when even a neutral, generally-applicable law burdens "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press" the Constitution requires the application of the compelling interest test. *Smith*, 494 U.S. at 881, 882.

Milford's treatment of the Good News Club presents a "hybrid situation" in which several rights are involved. Here, the Club's free exercise, free speech, and assembly rights are all implicated. *Widmar*, 454 U.S. at 273 n.13 (claim to use public forum also "implicates First Amendment rights of speech and association"). For this further reason, the compelling interest analysis should apply.

3. The only proffered justification for the inferior treatment of religion in Milford's Policy has been an alleged "reasonable" need to comply with the Establishment Clause. (Pet. App. C14.) The problem with this argument is that the

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[18] In *Hartmann*, Army regulations prohibited on-base, in-home day-care providers, selected at the parents' choice and expense, "from having any religious practices, such as saying grace or reading Bible stories, during their day-care program." The court found it "beyond peradventure" that the regulations were neither neutral nor generally applicable. *Hartmann*, 68 F.3d at 975, 978.

State must show more than a "reasonable interest" to discriminate against religion. As discussed above, it must show a "compelling state interest," and it must show that its restrictions are narrowly tailored to meet that interest.

Neither Milford nor New York has made either showing. For the reasons stated in section I(C) above, the Establishment Clause does not require all religious activity to be excluded from Milford's facilities. If some specific aspect of the Club's proposed use of the facilities creates too strong a connection between the School and the Club, Milford should explore less restrictive alternatives short of absolute exclusion to strengthen the separation between the two entities. But Milford has not explored less restrictive means of addressing such concerns. The Policy therefore violates the free exercise rights of the Good News Club.

III. MILFORD'S POLICY EXCESSIVELY ENTANGLES CHURCH AND STATE BY REQUIRING OFFICIALS TO DRAW DUBIOUS DISTINCTIONS BETWEEN RELIGIOUS INSTRUCTION AND SECULAR INSTRUCTION PRESENTED FROM A RELIGIOUS "VIEWPOINT."

Perhaps the most troubling feature of Milford's Policy, and the *Bronx Household* approach on which it is based, is its requirement that State officials scrutinize proposed religious events to decide if they are "merely" the presentation of a religious viewpoint or if they consist of forbidden religious instruction or worship. (Pet. App. A16); *Bronx Household*, 127 F.3d at 214-15. This creates an entanglement of church and State that has long been an Establishment Clause concern.

Distinguishing between even the broad categories of viewpoint and content is itself very difficult, as viewpoint discrimination "is but a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger*, 515 U.S. at 830-31. But, especially in the realm of religion, "the distinction is not a precise one . . . [for while]

religion may be a vast area of inquiry, . . . it also provides . . . a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.

Deciding where viewpoint ends and content begins in the highly sensitive area of religious activity will inevitably involve State officials in highly intrusive and subjective inquiries into the realm of religion. There is "no more disrupting influence apt to promote rancor and ill-will between church and State than this kind of surveillance and control. They are the very opposite of the 'moderation and harmony' between church and State which Madison thought was the aim and purpose of the Establishment Clause." *Lemon*, 403 U.S. at 637 (Douglas, J., concurring).

This Court dealt with the entanglement problems created by a very similar distinction in *Widmar*. There, the dissent tried to draw a distinction between allowing religious speech as opposed to religious worship into a public forum. *Widmar*, 454 U.S. at 283-84. The majority opinion was highly critical of this distinction and rejected it on four grounds, all of which also apply to the *Bronx Household* approach. *Id.* at 270, 272 n.11.

First, the distinction between religious worship and speech lacks "intelligible content," providing insufficient notice of what is prohibited. As noted in *Widmar*, it is virtually impossible to define the point at which forms of religious speech—such as singing, teaching, and reading—metamorphose into worship. *Id.* at 270. In this case it is equally difficult to locate the line, assuming it exists, between speech from a religious viewpoint, which is permitted under Milford's Policy, and religious instruction or worship, which is not. Much religious instruction concerns matters that are viewed as secular, including family matters, sexual behavior, business relationships, and other general ethical matters. The Biblical books of Proverbs, Ecclesiastes, Romans, and James, as well as Jesus' teachings in the Sermon on the Mount, attest to this fact.

How then would a government official determine whether a lesson on the Apostle Paul's teachings about sexual conduct constitutes speech from a religious viewpoint, or impermissible religious instruction? How would that official categorize a classical vocal rendition of the "Lord's Prayer," a piece of music viewed by some as high culture, by others as religious instruction, and by still others as adoration and worship? While an official may attempt to evaluate these presentations based on the style, manner, and tone of delivery, doubtless the decision would ultimately depend on the official's own religious viewpoint. There simply are no neutral, logically compelling, objective principles on which to base a decision.

In short, the distinctions required by the *Bronx Household* approach do not make sense practically, theologically, philosophically, or legally. As this Court has previously recognized, any attempt "to determine which words and activities fall within 'religious worship and religious teaching' . . . could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 272 n.11 (internal cites omitted).

Second, even if such distinctions had any meaning as a theoretical matter, the process of making them would be highly intrusive. Indeed, as this Court recognized in *Widmar*, "[m]erely to draw the distinction would require" a public official "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances of the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270.

The intrusion inherent in such inquiries is aptly illustrated by the manner in which the lower courts have scrutinized the activities of the Good New Club in this case. The Second Circuit claimed that "it is not difficult for school authorities to make the distinction between the discussion of . . . a religious viewpoint and the discussion of . . . religious instruction and

prayer." (Pet. App. A16.) Yet, in drawing this supposedly simple distinction, the lower courts spent between one third to one half of their opinions closely examining and weighing each activity of the Club for its religious significance. (See Pet. App. A3-A10, A15-A18, C15-C24, C31.) After culling through the details of songs and scripture reading, memory lessons and missionary stories, the Second Circuit disapprovingly opined that the "Good News Club goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ." (Pet. App. A17.) This is just the kind of intrusive analysis and negative judgment on religious views that created concern in *Widmar* about standards beyond "the judicial competence" of public officials. *Widmar*, 454 U.S. at 270.

Third, even if the distinction drawn in *Bronx Household* had a basis in logic and did not require an offensively intrusive inquiry into religious matters, enforcing that distinction would create its own problems. Here, as in *Widmar*, there would be a "continuing need to monitor group meetings to ensure compliance with the law," representing an almost insurmountable entanglement problem. *Widmar*, 454 U.S. at 272 n.11.

Making the distinction required by *Bronx Household*, insofar as it is meaningful, will turn on the manner in which songs, readings, or other religious utterances are expressed. But who will ensure that the conductor of the Christmas choir does not break out into "forbidden" prayer before or after the concert? Who will stand guard to prevent the discussion on life's origins from "degenerating" into a call to trust in the Great Creator? Who will restrain the faithful at a gospel music concert from breaking out in fervent—yet "illicit"—"Hallelujahs," "Amens," and "Praise the Lords," or from merely bowing their heads in quiet prayer?

But even if making and monitoring such distinctions did not present enormous practical difficulties, it is not at all

obvious why they should have any constitutional significance. As the *Widmar* Court asked, why would the Constitution "require different treatment for religious speech designed to win religious converts . . . than for religious worship by persons already converted[?]" *Id.*

So too here. The *Bronx Household* approach allows speech on "secular" topics from a religious viewpoint, even though such speech is often used in Christian apologetics with the aim of winning converts to a religious viewpoint. Examples of this are Biblical viewpoints on history, archaeology, and questions of the origins of life and the universe. Yet, the *Bronx Household* approach would ban similar speech if it were presented as worship for the already converted. Here, as in *Widmar*, there is no sound constitutional reason to treat the two differently.

In sum, as in *Widmar*, the *Bronx Household* approach requires distinctions founded on unintelligible criteria in an area beyond the competence of public officials. It raises insurmountable problems of enforcement. It creates distinctions of no clear constitutional relevance. And it is forbidden, not required, by the Establishment Clause.

* * * * *

The effect of the *Bronx Household* approach is to diminish and severely limit this Court's ruling in *Lamb's Chapel* outlawing religious discrimination in access to public forums. That approach has denied a wide range of religious groups, including the Good News Club, access to public facilities that are otherwise available to almost every other type of community group imaginable. Such exclusions are unconstitutional, and the rule on which they are based should be rejected in favor of an approach that accommodates the rights and desires of religious people to use public property on equal terms with other taxpayers, consistent with legitimate Establishment Clause guidelines.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision below should be reversed.

Respectfully submitted,

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November 30, 2000

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST

The African Methodist Episcopal Zion Church

The African Methodist Episcopal Zion Church, also known as the A.M.E. Zion Church, was founded in 1796, and is headquartered in Charlotte, North Carolina. A.M.E. Zion Church members share a common heritage with Christians of every age and nation according to the witness and teachings of the Apostles of Jesus Christ. The Church has a membership of approximately 1.5 million and has a vested interest in ensuring that its members and local congregations have equal access to public facilities.

The American Muslim Council

The American Muslim Council (AMC) was established in 1990 to increase the effective participation of American Muslims in the American public square. The American Muslim population, estimated at seven million, comprises Americans of all races and ethnic backgrounds. Because American Muslim organizations, like other Christian, Jewish, and secular organizations that are part of American civil society, frequently take advantage of programs that make space in schools and other public buildings available for rent when they are not in use for their primary purposes, AMC has a deep interest that such programs not be biased against organizations whose activities are, or may be perceived as, religious in nature.

The Baptist Joint Committee on Public Affairs

The Baptist Joint Committee on Public Affairs is composed of representatives from various national and regional cooperating Baptist conventions and conferences in the United States. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist

Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Many Baptist congregations meet in public school facilities after hours while their worship centers and education buildings are being constructed or renovated. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The First Church of Christ, Scientist

The First Church of Christ, Scientist, in Boston, Massachusetts, is "The Mother Church" of one of the major indigenous American religious denominations—Christian Science. The Church and its branch Christian Science churches and societies are collectively referred to as the Church of Christ, Scientist. There are more than 2,000 local Christian Science congregations existing in over sixty-five countries and in all fifty states and the District of Columbia. At least one of the local congregations currently meets in a public school. The Church is aware that a number of other congregations met in public facilities on an interim basis before obtaining their own buildings or private space. The First Church of Christ, Scientist, seeks to advance and preserve religious rights for all.

The General Assembly of the Presbyterian Church (U.S.A.)

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately

2,700,000 active members in 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Through its General Assembly, as its highest governing body, the Presbyterian Church has often spoken about religious expression in public places. In 1988 the General Assembly adopted a comprehensive policy on religious liberty entitled "God Alone Is Lord of the Conscience." In that policy the General Assembly said: "Religious speech and assembly by private citizens and organizations, initiated by them, is protected both by the Free Exercise of Religion and Free Speech Clauses of the Constitution and cannot be excluded from public places." That same Assembly continued: "If public . . . schools permit genuinely extra-curricular student initiated group activities in noninstructional time, religious expression should be permitted subject to the same regulations and restrictions."

The school board policy at issue in this case clearly falls outside those parameters. Religious Expression is the only use explicitly prohibited by that policy. Surely such a policy does not pass Constitutional muster. The Stated Clerk urges this Court to protect the rights guaranteed by the First Amendment for all religious persons in New York State.

The General Board of Church & Society of The United Methodist Church

The General Board of Church and Society of The United Methodist Church (the "General Board") is the public policy and social action agency of The United Methodist Church.

The primary responsibility of the General Board is to seek the implementation of the Social Principles and the Resolutions of The United Methodist Church. The United Methodist Church asserts the rights of all religions and their adherents to freedom from discrimination (Social Principles, Par. 66.III.B). Consistent with its mission, the General Board opposes any action of government that discriminates and denies access to public buildings because of the religious character of a program. Many United Methodist groups and churches use public school facilities for services and instruction after school hours. The General Board believes that any religious group should have the same access that other civic organizations have to school facilities.

The General Conference of Seventh-day Adventists

The North American Division of the General Conference of Seventh-day Adventists administers the work of the Seventh-day Adventist Church in the United States, Canada, and Bermuda, and represents more than 4,700 congregations with nearly 900,000 members. The Church strongly supports the twin concepts of the free exercise and non-establishment of religion and actively promotes those ideals through its bi-monthly *Liberty* magazine.

The Church's Working Policy points out "that religious liberty is best achieved, guaranteed and preserved when church and government respect each other's proper areas of activity and concern" and that "in matters where secular and religious interests overlap, government, in the best interests of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights."

The Church believes that public-school districts are not neutral in religious matters when they permit all but religious groups to use school facilities after hours. It believes that such unequal treatment violates both Equal Protection and First Amendment guarantees of the federal Constitution.

The National Council of Churches

The National Council of Churches, also known as The National Council of the Churches of Christ in the USA, is a community of 36 Protestant and Orthodox communions having an aggregate membership in the United States of over fifty million. Its positions on public issues are taken on the basis of policies developed by its General Assembly, composed of some 270 members who are selected by member communions in numbers proportionate to their size. Groups within the member communions of the National Council of Churches have used public school facilities, after school hours, for religious programming, and would be interested in maintaining that access.

The Reorganized Church of Jesus Christ of Latter Day Saints

The Reorganized Church of Jesus Christ of Latter Day Saints ("RLDS Church") is a Christian Church with world headquarters located in Independence, Missouri. The RLDS Church follows doctrines based upon the teachings of Jesus Christ, and its organization follows patterns of the New Testament Church. The RLDS has members and congregations in every state of the Union and in over 37 countries. The RLDS Church has local congregations which utilize public facilities, and conduct or participate in activities which utilize public facilities. The Church would like to preserve its ability to use such facilities on an equal basis with other, secular groups.

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No. 99-2036

IN THE
Supreme Court of the United States
OCTOBER TERM, 2000

GOOD NEWS CLUB, ET AL.,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* SALLY CAMPBELL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Establishment Clause *requires* the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

2. Whether the Free Speech, Free Exercise, and Equal Protection Clauses *permit* the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Sally Campbell has challenged a local policy in St. Tammany Parish, Louisiana, that is similar to the Milford policy at issue in this case. The school board of St. Tammany Parish allows after-hours use of its buildings for civic, recreational, and entertainment uses, and for other uses that pertain to the "welfare of the public." *Campbell v. St. Tammany School Bd.*, 206 F.3d 482, 484 (5th Cir. 2000). The St. Tammany policy expressly excludes partisan political activity, for-profit fundraising, and "religious services or religious instruction." *Id.* Ms. Campbell asked to use school facilities in St. Tammany School District for religious purposes. Relying on its policy, the School Board denied her request.

Ms. Campbell brought suit, alleging a violation of her First and Fourteenth Amendment rights. A panel of the United States Court of Appeals for the Fifth Circuit ruled that the Constitution does not require St. Tammany to allow religious speech in its facilities. *Id.* On October 26, 2000, over the dissent of Judges Jones, Smith, Barksdale, Garza, and DeMoss, the Court denied rehearing en banc. 2000 WL 1597749 (5th Cir.). Ms. Campbell intends soon to file a petition for writ of certiorari in this Court.

In their dissent from denial of rehearing en banc, Judges Jones, Smith, Barksdale, Garza, and DeMoss correctly contended that St. Tammany has created a public forum and that the content-based exclusion of religious speech from that forum is unconstitutional. For a forum to be considered a public forum, "[a]ll that is required is that the forum be 'generally open' to the public." *Id.* at *6 (Jones, J.). The St. Tammany facilities are "open 'indifferently' for use by private

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amicus curiae and counsel for amicus curiae made a monetary contribution to the preparation or submission of this brief. *See id.*

groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple." *Id.* at *8.

These five Judges also correctly explained that St. Tammany's exclusion of religious speech is, in any event, unconstitutional even under the test applicable to limited public fora. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Exclusions of speech from such fora must be both reasonable and viewpoint-neutral. The St. Tammany policy is unreasonable because it bears no relationship to the purposes of the forum: "To describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9 (Jones, J.). In addition, the St. Tammany policy discriminates on the basis of viewpoint, as is inherent in the exclusion of religious speech: "The crux of the issue is this: when measured against the 'welfare of the public standard,' how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" *Id.*

In summary, these five Judges stated: "It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the 'welfare of the public.' Once it did so, however, it could not arbitrarily discriminate against religious speakers." *Id.* at *10.

As this description reveals, the Milford case currently before the Court is not unique, but rather exemplifies a broader national problem of unjustified discrimination against religious speech in public facilities (as in St. Tammany). For that reason, and because the Court's resolution of this case is likely to affect the resolution of Ms. Campbell's case, Ms. Campbell respectfully submits this amicus curiae brief.

SCHOOL POLICY INVOLVED

The relevant portions of the Milford Community Use of School Facilities policy are as follows:

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes:
>
> 1. For the purpose of instruction in any branch of education, learning or the arts.
>
> * * *
>
> 3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public.
>
> * * *
>
> Use for Nonreligious Purposes. School premises shall not be used by any individual or organization for religious purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Community Use policy for the Milford Central School District, members of the public may use public school facilities for (i) "instruction in any branch of education, learning or the arts," (ii) "holding social, civic and recreational meetings and entertainment events," or (iii) "other uses pertaining to the welfare of the community." Milford's expansive public access policy contains one – and only one – express exception: "School premises shall not be used by any individual or organization for religious purposes." Pursuant to this policy, the Milford Board of Education denied the request of the Good News Club (a community-based youth organization that provides moral instruction from a Christian perspective) to use its facilities. *See* 202 F.3d 502 (2d Cir. 2000).

The discriminatory policy enacted by Milford Central School District targets religious speech for a distinctive burden. Milford's discrimination against private religious speech in general, and against the Good News Club in particular, is unconstitutional. As the Court has concluded in several virtually identical cases, the Constitution demands that private religious speech, religious people, and religious organizations receive at least the same treatment as their secular counterparts in gaining access to public facilities and public property. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Indeed, with respect to the precise issue of access to public school facilities that is raised in this case, the Court has repeatedly (and often unanimously) held that "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). In so ruling, the Court has emphasized time and again that the Free Speech and Free Exercise Clauses protect "*private* speech endorsing religion." *Id.* at 841 (majority opinion).

Because the Court has already ruled decisively on the two central issues raised here, this case requires the Court to break no new ground, but merely to reaffirm its prior holdings. *First*, the Establishment Clause does not *require* the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility. *Second*, the Free Speech, Free Exercise, and Equal Protection Clauses do not *permit* the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility.

ARGUMENT

I. THE CONSTITUTION DOES NOT *REQUIRE* THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

One fundamental question in this case is whether the Establishment Clause *requires* the government to exclude private religious groups such as the Good News Club from open and neutrally available public facilities. The answer is plainly no. The government may open public facilities on a neutral basis – for use by religious and secular groups alike – without violating the Establishment Clause.

To be sure, the Court has held that the Establishment Clause prohibits *government*-led or *government*-encouraged prayer to student audiences at certain public school events. *See, e.g., Santa Fe Indep. School District v. Doe*, 120 S. Ct. 2266 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962). But the Court has flatly rejected the broader and more extreme proposition that the Establishment Clause requires the government to eradicate *all* religious expression, *public and private*, from public schools and other public facilities. The Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.); *see also id.* at 775 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) (Establishment Clause not contravened "where truly private speech is allowed on equal terms in a vigorous public forum" so long as there is no "government manipulation of the forum"). The Court thus has emphasized time and again the critical distinction "between *government* speech endorsing religion, which the Establishment

Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quotation omitted).

Therefore, it is by now clear that the government does not violate the Establishment Clause when it allows religious individuals or groups to use public facilities or take public assistance that is available on a neutral basis to secular and religious alike. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). When the government provides facilities or aid on a neutral basis to religious and secular alike, there is no danger that the government has favored (and thereby endorsed) the religious over the secular – and thus no Establishment Clause violation. *Lamb's Chapel*, 508 U.S. at 395 ("Under these circumstances . . . , there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed . . . ."). A public facility open for use by private groups is "in a sense, surplus land" such that the government "conveys no message of endorsement" when it permits "privately organized and privately led groups of students (or others)" to use the facility. Laurence Tribe, *American Constitutional Law* § 14-5, at 1175 (2d ed. 1988).

If the rule were otherwise – that is, if the Establishment Clause barred the neutral extension of general facilities or benefits to religious groups – "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-75 (quotation

omitted). The Constitution requires no such discrimination against religious people and groups.

In assessing neutrality for purposes of the Establishment Clause, moreover, a government forum or benefit readily qualifies as neutral when (as here) the government makes the forum or benefit available to "a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 395. *See also Rosenberger*, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."); *Mergens*, 496 U.S. at 252 (neutrality requirement met given that "broad spectrum" of secular groups could use the facilities); *Widmar*, 454 U.S. at 277 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect"). In other words, the fact that numerous secular groups enjoy the same rights as religious groups more than suffices to demonstrate that the government has not impermissibly favored religion.

The fact that younger (and at least potentially more impressionable) children may attend school or play at a particular public building or park does not alter the Establishment Clause analysis, or the significance of neutrality as the government's essential safe harbor in complying with the Establishment Clause. On the contrary, with younger and more impressionable children, it is doubly important for the government to be scrupulously neutral so as not to convey a message that religion is disfavored. Otherwise, "[w]ithholding access" to religious groups, because they are religious, "would leave an impermissible perception that religious activities are disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). Justice O'Connor's assessment applies to young as well as old. After all, if a young student cannot "understand toleration of [private] religion in the schools" – which is the necessary premise of the impressionability argument – he or she

would be just as "incapable of understanding exclusion of [private] religion from the schools." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 19 (1987).[2]

In this case, the Establishment Clause does not require the exclusion of religious speech in general – or the Good News Club in particular – from Milford's open and neutrally available public facility. It is undisputed that the Good News Club is a private group, not a government organization, and it is undisputed that the Milford school is available to a broad class of secular educational events, "social, civic and recreational meetings and entertainment events," and other uses pertaining to the welfare of the community. The School District therefore would not be favoring (and thereby endorsing) religion over

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[2] If the Court were to accept the mistaken-attribution/impressionability argument, the appropriate remedy, as Justice Marshall stated in *Mergens*, would not be an outright ban on private religious speech, but merely a disclaimer making clear that the school does not endorse the groups or clubs that use its facilities. *See Mergens*, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold access program at issue in *Mergens* because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary); *see also Pinette*, 515 U.S. at 794 n.2 (Souter, J., concurring) (if there is a danger of confusion, "no reason to presume that an adequate disclaimer could not have been drafted"); *id.* at 769 (plurality) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.").

As to any possibility of student peer pressure, as was stated in *Mergens*, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Mergens*, 496 U.S. at 251. Again the appropriate remedy for the possibility of such pressure would not be an overbroad ban on religious speech, but a neutral mechanism for ensuring, for example, that only students with parental permission were allowed into meetings of private groups occurring in public school facilities. Of course, parental permission is already necessary to attend meetings of the Good News Club, which eliminates any such issue in this case.

non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter. When, as here, the government ensures neutrality by making its facilities available to religious and secular groups alike, "the message is one of neutrality rather than endorsement" and the Establishment Clause is not violated. *Mergens*, 496 U.S. at 248.

II. THE CONSTITUTION DOES NOT *PERMIT* THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

Because the Establishment Clause raises no barrier to religious speech in an open and neutrally available public facility, the remaining question is whether the Constitution *permits* the Milford School District to exclude religious groups such as the Good News Club from school facilities. Stated more directly, can the government unapologetically and unabashedly discriminate against private religious speech in a public facility? The answer to that question as well is no.

The basic principles that guide the free speech analysis are settled. "[P]rivate religious speech . . . is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760. A "free-speech clause without religion" would be, in the words of the Court, "Hamlet without the prince." *Id.* (opinion of Court for 7 Justices). The Constitution's protection for religious speech applies not just to speech from a religious perspective, but also to religious "proselytizing," *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981), and religious "worship," *Pinette*, 515 U.S. at 760; *Widmar*, 454 U.S. at 269 n.6.

It is "axiomatic" that the government "may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. When the

government targets not just subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* (internal citation omitted).

It is true that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Pinette*, 515 U.S. at 761. But when the government maintains a forum open to at least some speakers and subject matters, the government's "right to limit protected expressive activity is sharply circumscribed." *Id.*

In a public forum (whether a traditional public forum such as a park or a public forum designated by the government such as an open bandstand), the government may impose reasonable content-neutral time, place, and manner restrictions. But content-based exclusions from a traditional or designated public forum are subject to strict scrutiny and presumptively unconstitutional. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). When the government operates not a traditional or designated public forum, but what is referred to as a "limited public forum" or a "non-public forum," the government's ability to impose content-based exclusions may be more expansive. But the government still "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (internal quotations omitted); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *Perry*, 460 U.S. at 46.[3]

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[3] There is substantial confusion regarding the appropriate terms to describe these three categories. Some cases use the term "non-public forum" to describe what we refer to as a "limited public forum." *See, e.g., Cornelius*, 473 U.S. at 800. That, of course, creates no real confusion, but reveals that (continued...)

In this case, Milford's exclusion of Good News Club from its facilities is unconstitutional for any of four independent reasons.

- *First*, Milford has created a designated public forum, and Milford's exclusion of religious speech (the Good News Club) from that forum is content-based and viewpoint-based, is not justified by a compelling state interest, and thus is unconstitutional under the Free Speech Clause.

- *Second*, even if Milford has not created a designated public forum, it maintains a limited or non-public forum, and the exclusion of religious speech in general (and instruction about morals from a religious perspective in particular) is viewpoint-based and thus unconstitutional under the Free Speech Clause.

- *Third*, in order to exclude speech from a limited or non-public forum, the government's exclusion must also be reasonable in light of the purpose of the forum. The blanket exclusion of religious speech, because it is religious, from a forum is facially unreasonable where, as here, it bears no relationship to the purpose for which the forum was created. Milford's policy is thus unconstitutional under the Free Speech Clause for that reason as well.

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[3] (...continued)
there are two terms that may describe the same kind of forum. Some cases (including many in the Second Circuit) use the term "limited public forum" to describe what we refer to as a "designated public forum." *See Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207, 211 (2d Cir. 1997) ("designated public forum, sometimes called the 'limited public forum'"); *see also Good News Club*, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). That can generate substantial confusion because the standards governing those two kinds of forums otherwise would be different. In any event, the terminology we use in this case – traditional public forum, designated public forum, and limited public forum – is consistent with *Rosenberger*, but we nonetheless caution that the use of terminology is not entirely consistent among courts, advocates, and commentators.

• *Fourth*, putting aside the intricacies of free speech doctrine (whether a forum is a designated public forum or merely a limited public forum, whether an exclusion is viewpoint-based or merely content-based), the Milford policy contains a more basic constitutional flaw. The government's exclusion of religious speech, *because it is religious*, from a public facility violates the Free Exercise and Equal Protection Clauses, both of which bar governmental discrimination against religious people, religious organizations, and religious speech.

1. The policy adopted by the Milford Central School District has created a designated public forum with respect to Milford's school facilities. As a result, the content-based exclusion of religious speech (including the Good News Club) from those facilities is unconstitutional.

A government entity's traditional public fora are those places such as streets and parks that have "immemorially been held in trust for the use of the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In addition, the government can create a public forum for free speech (create the legal equivalent of, for example, a park) by opening public facilities to general use. *Perry*, 460 U.S. at 45. Public school facilities, in particular, become public fora when school authorities "by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (internal quotations omitted).

The Court's decision in *Widmar* is instructive on the forum definition issue. There, the University of Missouri at Kansas City made its facilities "generally available for the activities of registered student groups." 454 U.S. at 264-65. The school policy also stated: "No University buildings or grounds . . . may be used for purposes of religious worship or religious teaching." *Id.* at 265 n.3. Because the university had created a public forum, the Court subjected the content-based exclusion of religious speech from the forum to strict scrutiny: "[T]he

UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to *content-based exclusions*" – namely, strict scrutiny. *Id.* at 269-70 (emphasis added).

In *Lamb's Chapel*, the Court similarly considered whether the government policy at issue there – providing that school facilities were available to the public for educational, social, civic, and recreational purposes, and for other uses pertaining to the welfare of the community – created a public forum, or rather a limited public forum. The Court stated that the argument that the school district had created a public forum carried "considerable force," but the Court ultimately decided not to "rule on this issue" because the exclusion of religious groups was plainly viewpoint-based and unconstitutional regardless of the nature of the forum. 508 U.S. at 392-93.

The Court's "strong suggestion" in *Lamb's Chapel* that open school facilities may well be a public forum is a useful starting point, however, for considering the nature of the forum in this case. *See Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring). The Milford policy, in our view, plainly creates "a forum generally open to the public." *Perry*, 460 U.S. at 45. Indeed, it is hard to conjure up a more expansive access policy than one in which a public facility is open for any "social, civic, or recreational use," for uses pertaining to the welfare of the community, and for "instruction in any branch of education."[4] For that reason, numerous courts

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[4] To be sure, Milford requires that groups using its facilities also make its events "open to the general public." That is a "manner" restriction imposed on groups seeking to use the school facilities. That is not a

(continued...)

of appeals analyzing similarly expansive policies where school facilities were open for social, civic, and recreational use by outside groups have held that the schools created public fora. *See, e.g., Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5*, 941 F.2d 45, 48 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1378 (3rd Cir. 1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc).

For example, in the *Grace Bible* case, the First Circuit panel (including then-Chief Judge Breyer) assessed a policy that, as the Court characterized it, provided access for groups that were "good for the community unless, in the judgment of the school board, it is injurious to the school." 941 F.2d at 48. The school district excluded a group that wished to engage in religious speech. The First Circuit stressed that a school district opening its facilities for public use under such a policy "has no greater right to pick and choose among users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public use." *Id.* The Court concluded: "The bare fact is, [the school district] has volunteered expressive opportunity to the community at large, excluding some because of the content of their speech. This is elementary violation." *Id.*

This Court has looked not just to the policy, but also to the "practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. In this case, the factual record buttresses what the plain terms of the policy reveal. In particular, Milford has granted access to numerous groups such as the Boy Scouts, Girl Scouts, and 4-H Club.

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[4] (...continued)
content-based restriction and thus does not in any way call into question the conclusion that Milford operates a public forum. Indeed, if anything, the non-exclusivity requirement buttresses the notion that this is a designated public forum.

This practice is persuasive evidence regarding the open nature of the forum.[5]

In sum, the policy and the record show that Milford Central School has created a public forum. Thus, Milford's indisputably content-based exclusion of religious speech in general (and the Good News Club in particular) from that forum is unconstitutional. *See Widmar*, 454 U.S. at 269; *see also Campbell*, 2000 WL 1597749 at *8 (Jones, J.) ("The St. Tammany facilities are "open 'indifferently' for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple.").[6]

2. If Milford's forum is not a designated public forum, it is a limited public forum from which viewpoint-based exclusions are unconstitutional. The decisions in *Lamb's Chapel* and

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[5] The government cannot rely on a vague definition of the forum to escape the conclusion that it has created a public forum. "If the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." *Gregoire*, 907 F.2d at 1375. Were the rule contrary, "[a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal." *Mergens*, 496 U.S. at 244.

[6] The court of appeals suggested that the parties had agreed that Milford created only a limited public forum. 202 F.3d at 509. But as explained above, Second Circuit precedent conflates the categories of designated public fora and limited public fora by suggesting that the categories are governed by the same rules. *See Bronx Household of Faith*, 127 F.3d at 211 ("designated public forum, sometimes called the 'limited public forum'"); *see also Good News Club*, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). Any concession that a "limited public forum" was involved in this case is, therefore, not a concession at all given Second Circuit precedent that equates a designated public forum and a limited public forum. For that reason, the Court should independently assess the nature of the forum in this case, unconstrained by the parties' prior Second-Circuit-induced characterizations.

Rosenberger demonstrate, moreover, that Milford's exclusion of religious speech in general (and of the Good News Club in particular) from its school facilities is viewpoint-based and thus unconstitutional.

In *Lamb's Chapel*, the Court considered a school policy like the one at issue in this case that provided: "[S]chool premises shall not be used by any group for religious purposes." 508 U.S. at 387. Pursuant to that policy, the school denied a church's request to use school premises "to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today." *Id.* The record did not indicate "that the application to exhibit the particular film series . . . was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." *Id.* at 393-94. The Court held that this exclusion of religious perspectives was viewpoint-based and "plainly invalid." *Id.* at 394. The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious viewpoint." *Id.* at 393.

The Court reached the same result in *Rosenberger*. The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious student group. The Court held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Relying on *Lamb's Chapel*, the Court stressed that "discriminating against religious speech [is] discriminating on the basis of viewpoint." *Id.* at 832 (emphasis added). In particular, "[r]eligion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. As that language demonstrates, the *Rosenberger* Court concluded that the exclusion of religious speech, ideas,

thought, and uses from a forum is *inherently* and *by definition* viewpoint-based.

In this case, *Lamb's Chapel* and *Rosenberger* make clear that Milford's policy and exclusion of the Good News Club is patently unconstitutional. The Milford School District allows instruction about morals provided from a secular perspective, but disallows instruction about morals from a religious perspective. As Judge Cabranes observed in a factually similar case, "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination." *Bronx Household of Faith*, 127 F.3d at 220 (concurring and dissenting). Similarly, in *Campbell*, Judge Jones correctly analyzed a vague "welfare" standard similar to that in Milford: "when measured against the 'welfare of the public' standard, how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" *St. Tammany*, 2000 WL 1597749 at *9.[7]

Of course, under *Rosenberger*, the express exclusion of religious uses is, in any event, *inherently* viewpoint-based, and thus unconstitutional regardless of the nature of the forum. As the Court said, "[r]eligion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.[8]

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[7] Bound by Second Circuit precedent, Judge Cabranes' opinion in that case did not take issue with the circuit's distinction between religious speech and religious worship. Such a distinction is, however, flawed for the reasons discussed below.

[8] The four dissenters in *Rosenberger* likewise recognized that discrimination against religious speech was unacceptable. "The common factual thread running through *Widmar*, *Mergens*, and *Lamb's Chapel*, is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was

(continued...)

Milford's exclusion of certain religious speech cannot be saved or cabined by positing a distinction between (i) speech from a religious perspective and (ii) religious prayer or worship. The court of appeals attempted to split the atom and to draw such a line, but that is impossible: Religious worship is religious speech and religious thought. As Judge Jacobs persuasively explained, moreover, "[d]iscussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially – quintessentially – religious." 202 F.3d at 515 (dissent).

So, too, the Court in *Widmar* flatly dismissed the idea that religious worship could be segregated from religious speech for purposes of free speech doctrine. The Court said that it is impossible to draw the line where singing, reading, and teaching transforms into "worship." 454 U.S. at 269 n.6. The *Widmar* analysis is surely correct, as there is no basis in precedent or logic for placing religious speech in one First Amendment category and religious worship in another First Amendment category.

In sum, even assuming that the Milford policy does not create a designated public forum, but only a limited or non-public forum, the exclusion of the Good News Club is viewpoint-based and thus unconstitutional.

3. A third independent reason why the exclusion of Good News Club violates the Free Speech Clause is the utter unreasonableness of the exclusion in light of the forum's

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[8] (...continued)
struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in *Widmar* and *Mergens*) or to suppress a particular religious viewpoint (as in *Lamb's Chapel*). . . . Each case . . . drew ultimately on the unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum." 515 U.S. at 888 (Souter, J., dissenting) (internal citations omitted).

purposes. In a limited public forum, the government's exclusion of particular speech not only must be viewpoint-neutral, but also must be "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806; *see also Rosenberger*, 515 U.S. at 829 (same); *Perry*, 460 U.S. at 49 (same; government may limit activities in forum, but cannot exclude "activities compatible with the intended purpose of the property"). In this case, Milford's express exclusion of religious speech does not serve any legitimate purpose of the forum.

In *Lamb's Chapel*, having found that the exclusion was viewpoint-based and thus unconstitutional, the Court did not reach the additional question whether the exclusion was "unreasonable in light of the purposes of the forum." But the Court did pointedly note that the Second Circuit had "uttered not a word in support of its reasonableness holding" and that if the rule were unreasonable, "it could be held facially invalid." 508 U.S. at 393 n.6. As suggested by the Court in *Lamb's Chapel*, therefore, the reasonableness analysis is a separate and vitally important aspect of the inquiry in limited public forum cases. And it provides an independent basis for striking down Milford's action in this case.

The "reasonableness" inquiry necessarily focuses, first, on the purpose of the Community Use policy and, second, on how that purpose is allegedly thwarted by allowing the forum to be used for religious purposes. The Milford policy allows the forum to be used for instruction in any branch of education, for uses pertaining to the welfare of the community, and for holding social, civic, and recreational meetings and entertainment events. The clear purpose of the Milford policy on its face is to provide the community with a place to meet and to speak as individuals and groups – a public service provided by the government in the same way that parks are a public service to the people. It is inconceivable, however, that allowing religious speech in that public building would somehow undermine or thwart those purposes. That is especially so given that the policy allows uses pertaining to the "welfare of the community."

As Judge Jones said in analyzing a similar policy in *Campbell*, "[t]o describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9.

Indeed, the only possible bases for excluding religious speech would be (i) a blatant desire to disfavor religious speech or (ii) a claim that the Establishment Clause required exclusion. The former argument is unreasonable as a matter of law (and unconstitutional, as discussed below), and the latter is unavailing under this Court's precedents. In short, then, the Community Use policy's exclusion of use for "religious purposes" is unreasonable in light of the purposes served by the forum. *See St. Tammany*, 2000 WL 1597749, at *8 (Jones, J.) (policy excluding religious speech is "unreasonable" and "doomed"); *see also* Br. of Amicus Curiae American Center for Law and Justice at 17-29.

4. Aside from the intricacies of free speech doctrine, a more fundamental point demonstrates that Milford's exclusion of the Good News Club is unconstitutional. Under the Free Exercise and Equal Protection Clauses (as well as the Establishment Clause), the government may not discriminate against religion, just as the government may not discriminate on the basis of race. The government thus may not impose a burden or deny a benefit because of the religious nature of a group, person, writing, speech, or idea. To use the words of Justice Brennan, the government "may not use religion as a basis of classification for the imposition of duties [and] penalties . . ." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Of course, the non-discrimination principle articulated by Justice Brennan is by now firmly entrenched in this Court's jurisprudence. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons"); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government "may not

impose special disabilities on the basis of religious views or religious status.").

Except in the context of a permissible accommodation of religion, the government must act on a religion-neutral basis, based on objective and discernible criteria that do not refer to or target religion. For example, if the government bars certain categories of speech or activities from a public facility (say, events with more than 50 people in attendance) and defines the limitation without reference to religion, the Constitution is not violated even though a religious meeting with more than 50 people in attendance would be excluded from the facility. In such a case, the government has not *discriminated* against religion (putting aside, of course, any issue of required accommodation under the Free Exercise Clause).

On the other hand, where the government excludes religious speech – *because* it is religious – from a public facility, the government has plainly discriminated against religion and just as plainly violated the Constitution. And that is precisely what Milford has done in this case by targeting religion for a distinctive burden.

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS.

In closing, it bears mention that the Milford policy poses two additional and important threats to religious liberty and freedom – threats that this Court has emphasized before and that should inform the analysis in this case.

First, Milford's policy creates grave dangers of excessive entanglement – namely, of the government seeking to monitor and inquire into the content of speech to determine whether it is sufficiently "religious" to require exclusion. This Court on many occasions has emphasized the constitutional dangers implicated when the government intrudes in this way into the

nature of speech. *See Mergens*, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *cf. Lee v. Weisman*, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

The Court in *Rosenberger* elaborated on the problem, stating that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. The Court continued: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. *That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion. . . .*" *Id.* at 845-46 (emphasis added).

Second, the School District's policy necessarily induces people seeking to use public facilities to water down their speech and to hide the religiosity of their message in order to satisfy a government administrator that a proposed meeting is not *really* for "religious purposes." That demeaning and disturbing exercise is neither mandated nor permitted by the Constitution. The Constitution is not "some sort of homogenizing solvent" that forces religious groups "to choose between assimilating to mainstream American culture or losing their political rights." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring). The Constitution in no way licenses the government to operate a checkpoint where religious people who hide their beliefs and intentions are allowed through, but those who express their true beliefs and intentions are turned away.

In short, these two factors underscore the sound prudential and historical reasons why the Constitution neither requires nor permits discrimination against religious people and religious speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,
Petitioners,
v.
MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been actively engaged in defending the right of equal access to public fora throughout the nation.

Liberty counsel defends the right of equal access to public fora. Liberty Counsel is very concerned about the Second Circuit's treatment of the public forum doctrine. Allowing the Second Circuit's public forum doctrine to go unabated by this Court will cause grave harm to the public forum doctrine. Today the disfavored speech in the Second Circuit is religious. Tomorrow the disfavored speech may include a much broader category.

Liberty Counsel defends the right of all people to have equal access to public fora, and believes that if a subject matter is banned from the fora, the government must show a compelling interest of the highest order, which interest must be achieved in the least restrictive means available.

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has created the public forum doctrine to determine when regulations or restrictions on speech violate the First and Fourteenth Amendments of the United States Constitution. The public forum doctrine recognizes three types of fora: (1) the traditional public forum, (2) the designated public forum, and (3) the non-public forum. A traditional public forum is a place that has historically been used for communicative activity. Traditional public fora include public streets, parks, and sidewalks. Any regulation on the content of speech in a traditional public forum must be necessary to serve a compelling governmental interest and narrowly drawn to achieve that interest. If the regulation is content-neutral, the government may impose reasonable time, place and manner regulations if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open.

A designated public forum is a place where, by designation, the state has created a generally open forum for expressive activity. Any regulation on the content of speech in a designated public forum must be necessary to serve a compelling governmental interest and narrowly drawn to achieve that interest. If the regulation is content-neutral, the government may impose reasonable time, place and manner regulations if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. The test applied to a designated public forum is identical to the test applied to a traditional public forum. The difference between the two fora is that the government may close the designated public forum.

A nonpublic forum is a place that is neither traditionally held out to the public, nor designated by the government, to be used for communicative activity. Examples of nonpublic fora

include, but are not limited to, international airports and telephone poles. Any regulation on the content of speech in a nonpublic forum must be reasonable in light of the purpose served by the forum and viewpoint neutral.

The Second Circuit has abandoned the public forum doctrine created by the United States Supreme Court in two ways. First, while the Second Circuit recognizes the three forums created by this Court, the Circuit has created a new sub-category under the designated public forum, which the Circuit refers to as a limited public forum. Second, the Circuit changed the standard of review for content-based restrictions in the designated public forum. The Second Circuit applies a reasonableness standard to restrictions on the content of speech in a designated public forum, and to content-based restrictions under the "sub-category" forum called a limited public forum. By applying a reasonableness standard instead of a strict scrutiny standard, the Second Circuit has allowed a state actor to escape the constitutional restrictions on content-based restrictions. The state can now do an end-run around the Constitution and discriminate against certain groups or ideas under the guise of a "limited" public forum.

The proper constitutional framework for the public forum doctrine should include the three classifications of public fora as created by this Court. There are three classifications of public fora: (1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum. Traditional public fora include streets, parks and places that by long tradition have been devoted to assembly and debate. Restrictions of speech in a traditional fora must be narrowly drawn to achieve a compelling state interest. In addition, reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open.

A designated public forum consists of public property which the state has generally opened, either by policy or practice, for the public as a place for expressive activity or indiscriminate use. A state may not enforce content-based exclusions from a designated public forum unless the restrictions serve a compelling state interest and are narrowly drawn to achieve that interest. A designated public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects. However, subject matter restrictions must survive a strict scrutiny test. Reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open.

A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. Any content-based restriction must be reasonable in light of the purpose served by the forum and viewpoint neutral.

ARGUMENT

I.

APPLYING A REASONABLENESS STANDARD TO EVALUATE THE EXCLUSION OF A SUBJECT MATTER FROM A GENERALLY OPEN FORUM WOULD UNDERMINE THE SUPREME COURT'S PUBLIC FORUM DOCTRINE.

The Supreme Court utilizes the public forum doctrine in determining when regulations excluding speech on state property violate the First and Fourteenth Amendments of the United States Constitution. There are two guiding principles behind the Supreme Court's public forum doctrine. First, the government must not discriminate against speech based on the

substantive content of that speech. "It is axiomatic that the government may not regulate speech based on its substantive content of the message it conveys." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994) (stating that discrimination against speech because of its message is presumed to be unconstitutional). This principle of non-discrimination should be the predominate concept behind the public forum doctrine. As Judge Jacobs said in his dissent below, "Even if one could not say whether the Club's message conveyed religious content or religious viewpoints on otherwise-permissible content, we should err on the side of free speech. The concerns supporting free speech greatly outweigh those supporting regulation of the limited public forum." *Good News Club v. Milford Central School*, 202 F.3d 502, 515 (2nd Cir. 2000).

The second principle guiding the Supreme Court's public forum jurisprudence (outside the traditional public forum) is that the government, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. *See Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985). This Court's public forum doctrine incorporates these two principles in determining if restrictions on the content of speech are unconstitutional. The public forum doctrine should not, however, be used to allow the state to make an end-run around the Constitution by discriminating against any group based on the content of speech. The principle that the government may legally preserve the property under its control for its dedicated use should be applied cautiously. It should only be used to the extent it allows the government to properly manage its property, in a manner similar to a business, according to the purpose for which the property was dedicated. However, allowing government to manage its property does not mean the government has a license to engage in content-based discrimination.

In determining whether a regulation of speech by a state actor on property owned by the government violates the First and Fourteenth Amendments, the first inquiry is to determine the type of forum subject to the regulation.

The Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. *See Cornelius*, 473 U.S. at 800.

This Court has recognized three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Id.* at 802.

A.

The Traditional Public Forum.

Traditional public fora are places "which by long tradition or by government fiat have been devoted to assembly and debate," and where "the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1982). Traditional public fora include streets, sidewalks and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also Perry Educ. Ass'n*, 460 U.S. at 45.

In order to regulate the content of speech in a traditional public forum, the regulation must pass strict scrutiny. "Because

a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Perry Educ. Ass'n.*, 460 U.S. at 45; *see also Carey v. Brown*, 447 U.S. 455, 461 (1980) ("For the state to enforce a content-based exclusion [in a traditional public forum] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.") The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, if the regulation is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. *See Perry Educ. Ass'n.*, 460 U.S. at 45; *see also United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 132 (1981).

B.

The Designated Public Forum.

The designated public forum is the second type of forum under this Court's public forum doctrine. In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46, n. 7; *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint Sch. Dist. v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976). A designated public forum consists of public property which the government has opened for use by the public as a place for expressive activity. The Constitution requires exclusions from a forum *generally* open to the public to survive a strict scrutiny test even if the government was not required to create the forum in the first place. *See Perry Educ. Ass'n.*, 460

U.S. at 45-46.

While the state is not required to keep open a designated forum, the state may only discriminate against the content of speech in a designated public forum if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest (the same test applied to content restrictions in a traditional public forum). *Id*; *see also Widmar*, 454 U.S. at 269-270 ("Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.") Reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46.

A central inquiry into designated public fora that this Court has not yet fully addressed involves the bounds and limits of a designated public forum. In other words, how open does a forum have to be before it is considered a designated public forum? In *Lamb's Chapel v. Center Moriches Union Free School District*, the church argued, in essence, that because the school district had opened the doors to its facilities so wide, that it had created a designated public forum so that "restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks." 508 U.S. 384, 391 (1993). While recognizing that the church's argument had considerable force, the Court concluded that it need not decide the issue in that case. *See Id.* at 391-92. Instead, the Court held that the school district engaged in unconstitutional viewpoint discrimination as it denied the church access to school property solely on the basis that it did not want a Christian viewpoint to be presented. *See Id.* at 392.

This Court has hinted at standards to be used in determining whether a designated public forum had been created. The government creates a designated public forum by intentionally opening a nontraditional forum for public discourse. *See Cornelius*, 473 U.S. at 802. This Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. *See Perry Educ. Ass'n.*, 460 U.S. at 47. In addition, this Court has examined the nature of property and its compatibility with expressive activity to determine the government's intent. In *Widmar*, this Court found that a state university with an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. *See Widmar*, 454 U.S. at 267. The Court noted that the university's policy evidenced a clear intent to create a public forum. *See Id.* Also important to the Court's analysis was that a university campus, at least as to its students, possessed many of the characteristics of a traditional public forum. *See Id.* at 267 n. 5. Finally, this Court will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will it infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. *See Cornelius*, 473 U.S. at 788.

Courts have often confused the "designated" and the "limited" forums and have used those terms interchangeably. For example, in *Perry*, this Court, while describing the second classification of fora subject to strict scrutiny, stated, "a public forum may be created for a *limited* purpose such as use by certain groups or for the discussion of certain subjects." *Perry Educ. Ass'n*, 460 U.S. at 46 n.7 (emphasis added). In *Lamb's Chapel*, this Court, in describing the holding of the Second Circuit, stated, "It held that the school property, when not in use for school purposes, was neither a traditional nor a designated public forum; rather, it was a *limited* public forum open only for

designated purposes." *Lamb's Chapel*, 508 U.S. at 390 (emphasis added). The confusion usually arises when the courts suggest that the government may *limit* the *designated* public forum for its intended use. The confusion is magnified in the Second Circuit where they have combined the limited and the designated forum into one category. *See Bronx Household of Faith v. Community School Dist. # 10*, 127 F.3d 207 (2nd Cir. 1997), *cert. denied*, 523 U.S.1074 (1998) (referring to the second category of fora as "the designated public forum, sometimes called the 'limited public forum.")

C.

The Nonpublic Forum.

The third forum in the public forum doctrine is the nonpublic forum. This Court has recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service*, 453 U.S. at 129. Public property which is not by tradition or designation a forum for public communication is a nonpublic forum, governed by different standards. *See id.* "The State, no less than a private owner or property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.*

In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because of the speaker's view. *See id.*; *Perry Educ. Ass'n.*, 460 U.S. at 49. ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.") Consequently, this Court has stated that a speaker may be excluded from a

nonpublic forum if the speaker wishes to address a topic not encompassed within the purpose of the forum. *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974).

The nonpublic forum, however, should not be used to provide an end-run around the public forum doctrine. Following the lead of the Second Circuit, the Fifth and Tenth Circuits have essentially replaced the designated forum with the nonpublic forum, and thus changed the standard of review for any speech restriction in a designated public forum. *See Campbell v. St. Tammany Parish School Board*, 2000 WL 1597749 (5th Cir.); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997); *Bronx Household of Faith*, 127 F.3d at 207. The Second Circuit has upset the designated public forum by applying a reasonableness standard to any content based restriction in a designated public forum.

For example, in *Good News Club*, the school opened its facilities to use by the general public "for holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." 202 F.3d at 504. Access was limited in that the facilities were not permitted to be used by any individual or organization for religious purposes. *See id.* In essence, the school was "generally" open to the public, except if such use had a religious purpose. The Second Circuit approved this speech restriction, claiming that the school had created a limited public forum, and applied a reasonableness test to the restriction. *See id.* at 509.

A review of Supreme Court cases which defined the boundaries and parameters of the nonpublic forum illustrate the narrow application that should accompany this forum. In *Perry*, a union and its members brought suit challenging a provision of a collective bargaining agreement between a school district and the exclusive bargaining representative that granted the bargaining representative exclusive access to teacher mailboxes

and the interschool mail system to the exclusion of rival unions. *See Perry Educ. Ass'n*, 460 U.S. at 37. This Court held that public property which is not by tradition or designation a forum for public communication may be reserved by the state for its intended purposes, communicative or otherwise, as long as regulation on speech is reasonable and not an effort to suppress expression merely because the public officials opposed the speaker's views. *Id.* at 55.

Perry was decided under a nonpublic forum category. The Court held that the "normal and intended function of the school mail facilities is to facilitate internal communication of school related matters to teachers." *Id.* at 46. The internal mail system was not held open to the general public. This Court held that the school district mailboxes were a nonpublic forum, and consequently applied a reasonableness test in denying the request to have access to the mail system. *Id.*

This Court addressed the issue of nonpublic fora two years later in *Cornelius*. *See* 473 U.S. at 788. In *Cornelius*, a legal defense fund ("Fund") was denied access to the Combined Federal Campaign ("CFC"), a charity drive aimed at federal employees and military personnel. The Fund sued, claiming that its exclusion from the fund raising campaign violated the First Amendment right to free speech. This Court held that the government does not violate the First Amendment in a nonpublic forum when it limits participation in a charity drive aimed at federal employees in order to minimize disruption of the federal workplace, to ensure the success of the fund raising effort or to avoid the appearance of political favoritism without regard to the viewpoint of the excluded groups. *See id.* at 808. The case, however, was remanded to determine whether the Fund's exclusion was due to viewpoint discrimination.

In reaching its holding, the Court applied a public forum analysis. The Court recognized the three classifications of fora:

(1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum. *See id.* at 799. This Court stated that the first two categories required the government to pass a strict scrutiny test in order to regulate the content of speech in those forums. The third category, a nonpublic forum, required a more lenient test. In this category, access can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view. *See id.* at 805. This Court held that the fund raising campaign was a nonpublic forum, and consequently applied the reasonableness standard. It is important to note that this case cites to *Perry* where this Court stated that in a designated public fora, the state can place regulations on the identity of the speaker and the subject matter if the regulations pass a strict scrutiny review. *See id.* at 799 (*citing Perry Educ. Ass'n.*, 460 U.S. at 46) ("A public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects."). Again, the forum in question was a fund-raising campaign that was only open to certain groups. The forum in question was not a forum that was generally open to the public.

In *Lamb's Chapel*, a church brought suit alleging that a school district violated its constitutional rights by refusing the church's request to use school facilities for a religious oriented film series on family values and child rearing. *See* 508 U.S. at 384. The Court held that the school district violated the free speech clause of the First Amendment by denying the church access to the school premises solely because the film dealt with the subject from a religious standpoint. *See id.*

While the prior "forum" cases clearly discussed this issue within the three distinct public fora , i.e., traditional, designated and nonpublic, the Court in *Lamb's Chapel* decided not to classify the forum because the case clearly involved viewpoint discrimination (which is always unconstitutional irrespective of

the forum). In other words, even assuming that the forum was a nonpublic forum, the restrictions could not survive because they were not viewpoint neutral. *See id.* at 392-93.

Finally, in *Rosenberger*, a university student organization which published a newspaper with a Christian editorial viewpoint brought suit against the university challenging its denial of funds from a fund created by the university to make payments to outside contractors for printing costs of publications of student groups. *See* 515 U.S. at 819. This Supreme held that the denial of funding amounted to viewpoint discrimination. *See id.* at 835. This Court, in applying the nonpublic forum standard to the decision to exclude the religious paper, held that the denial of funding amounted to viewpoint discrimination and thus unconstitutional. *See id.*

In summary, this Court has never declared that a public facility that is generally opened to the public, similar to the forum opened by Milford Central School, is a nonpublic forum, or a even a limited forum, subject to a reasonableness review. Some instances of a nonpublic forum which this Court has addressed include a post office, a school mail room, a military base, airports, utility poles, and transportation facilities. *See e.g., id.*; *ISKCON v. Lee*, 505 U.S. 672 (1992); *Bd. of Airport Comm's of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987); *Cornelius*, 473 U.S. at 788; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Perry Educ. Ass'n.*, 460 U.S. at 37; *United States Postal Service.*, 453 U.S. at 114 *Greer v. Spock*, 424 U.S. 828 (1976); *Adderley v. Florida*, 385 U.S. 39 (1966). These nonpublic fora were not generally open to the public for expressive activity. However, the fora in Milford Central School has been opened to the community for various forms of expression. The forum in the Milford Central School is clearly a designated public forum. Subject matter exclusions from this forum must survive strict scrutiny.

II.

THE DEVELOPMENT OF THE PUBLIC FORUM DOCTRINE BY THE SECOND CIRCUIT COURT OF APPEALS.

While the Second Circuit claims to follow this Court's public forum doctrine, the Circuit has significantly altered the doctrine. In essence, the Circuit has replaced a strict scrutiny standard with a reasonableness standard to content based restrictions in the second classification of forums, which the Second Circuit describes as "the designated public forum, sometimes called the 'limited public forum.'" *Bronx Household of Faith v. Community School Dist. # 10*, 127 F.3d 207 (2nd Cir. 1997), *cert. denied*, 523 U.S.1074 (1998). The limited public forum created by the Second Circuit looks like the designated public forum created by this Court, yet applies a reasonableness test to any speech restrictions in the limited public forum. According to the Second Circuit, the nature of restrictions on speech is based on "the nature of the forum in which the speech is delivered." *Id.* at 211. There are three general types of forums in this regard: (1) traditional public forums, (2) designated or limited public forums, and (3) nonpublic forums. *See id.*

The Second Circuit describes this Court's treatment of the public forum doctrine as follows:

> The Supreme Court has identified three types of forums: the traditional public forum; the designated public forum, sometimes called the "limited public forum"; and the nonpublic forum. . . . Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain

> speakers, or for the discussion of certain subjects." But restrictions on access based on speaker identity and subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Where the proposed use falls outside of the limited forum, "the State is subject to only minimal constitutional scrutiny." A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. In such a forum, the government may make "distinctions in access on the basis of subject matter and speaker identity."

Id. at 211 (citations omitted).

The Second Circuit has misread this Court's opinion concerning the public forum doctrine. In *Bronx Household of Faith*, the Second Circuit, in describing the limited public forum, quoted from *Cornelius*, stating that limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household of Faith*, 127 F.3d at 211, *quoting Cornelius*, 473 U.S. at 802. The Second Circuit then stated that "restrictions on access based on speaker identity and subject matter are permissible if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Bronx Household of Faith*, 127 F.3d at 211, (*quoting Cornelius*, 473 U.S. at 806).

The Second Circuit erred, however, as the section of *Cornelius* that *Bronx Household of Faith* cites to refers to a designated public forum, and not a nonpublic forum. This is a critical distinction as this Court in *Cornelius* stated that "when

the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest." *Cornelius*, 473 U.S. at 800. In other words, the Second Circuit cited to *Cornelius* for support to apply a reasonableness standard to restrictions in the second forum classification, which the Second Circuit describes as designated or limited, while *Cornelius* actually requires a strict scrutiny standard.

The Second Circuit effectively has abolished the designated public forum by combining the designated public forum with the limited public forum and applying a reasonableness standard. Based on the public forum analysis applied by the Second Circuit, there is no difference between a "designated public forum, sometimes called the "limited public forum" and a "nonpublic forum." According to the Second Circuit, limited public fora are those that the government has *designated* as a "place . . . of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household of Faith*, 127 F.3d at 211 (quotations omitted). According to the Second Circuit, N.Y. Education Law § 414 and policies promulgated thereunder create limited public fora. *See, e.g., Full Gospel Tabernacle v. Community Sch. Dist., 27*, 164 F.3d 829, 829 (2nd Cir. 1999) (per curiam), *aff'g* 979 F. Supp. 214, 220 (S.D.N.Y. 1997); *Bronx Household of Faith*, 127 F.3d at 215; *Deeper Life Christian Fellowship, Inc. v. Bd. of Educ.*, 852 F.2d 676, 680 (2nd Cir. 1988).

The Second Circuit has applied the same reasonableness standard, i.e., content based restrictions are permissible if they are reasonable in light of the purpose served by the forum and are viewpoint neutral, to the designated public forum, which the Circuit sometimes refers to as a the limited public forum. *See Bronx Household of Faith*, 127 F.3d at 211. The Second Circuit has misconstrued the proper standard to apply to restrictions in

a designated and limited public forum. The Second Circuit does not apply the strict scrutiny test, but rather a reasonableness test. In the Second Circuit, restrictions on speech in a limited public forum will withstand First Amendment challenge if they are reasonable and viewpoint neutral. *See Good News Club v. Milford Central School*, 202 F.3d 502 (2000); *Bronx Household of Faith*, 127 F.3d at 214. The Second Circuit applies strict scrutiny to content-based restrictions if the subject matter is permitted (which under the Supreme Court's precedent would be viewpoint) and reasonableness to exclude subject matter that is not permitted (where the Supreme Court precedent would apply strict scrutiny). The Second Circuit's approach to the public forum doctrine destroys the public forum.

A.

The Fifth Circuit Has Erroneously Adopted the Second Circuit's Forum Analysis.

The Second Circuit's approach is a cancer that is eating away at this Court's public forum doctrine. Now, this cancer has spread and is contaminating the public forum doctrine in other circuits. The Fifth Circuit has now joined the Second Circuit in misconstruing the public forum doctrine, and particularly, the appropriate standard of review for content based restrictions to a designated public forum. In *Campbell v. St. Tammany Parish School Board*, 2000 WL 1597749 (5th Cir.), a case similar to *Good News Club*, the plaintiff requested to use the school facilities to "worship the Lord in prayer and music" and to "pray about" and "engage in religious and Bible instruction with regard to" various issues. The school board denied the plaintiff's request, citing a school board policy that permitted its facilities to be used for "civic and recreational meetings and entertainment and other uses pertaining to the welfare of the community," but not for partisan political activity,

for-profit fund-raising, and "religious services or religious instruction." *Id.* at *1. The court stated:

> In sum, the record shows that St. Tammany schools were overwhelmingly used by groups for activity of interest to students or parents. Such a limited set of uses does not create a public forum, as the Supreme Court held in *Perry Education Association v. Perry Local Educators' Association* . . . St. Tammany's policy is supported by rational reasons sufficient to rebut any inference that its decision to exclude religious services was viewpoint discriminatory. Especially where, as here, the school district has affirmative evidence that its motive was not viewpoint discrimination, such reasons need only be rational. They need not be compelling.

Id. at 2-3.

In a holding similar to the Second Circuit's, the Fifth Circuit held that although the school board had created a forum that was open to the general public for uses pertaining to the welfare of the community, yet had specifically excluded any religious instruction, it had created a limited public forum subject only to a reasonableness standard. *Id.* 5.

Judge Jones, writing for the dissent of five judges to the denial of *en banc* review, recognized that the majority was recognizing the wrong forum and applying the wrong standard, stating "[w]ith due respect, the panel is looking through the wrong end of the telescope. Such a *narrow* view of the conditions under which a designated public forum can arise is incorrect." *Id.* at 6. Judge Jones stated that the approach taken by the majority "conflicts with the Supreme Court's equal access and viewpoint discrimination cases, decisions of five other

circuit courts, and previous Fifth Circuit cases." *Id.* at 6.

In the dissent, Judge Jones stated, "When public facilities are available for 'indiscriminate use by the general public', a designated public forum exists, and content-based exclusion of speakers must survive strict scrutiny review.'" *Id.* at 6. In determining whether a designated public forum had been created, "all that is required is that the forum be 'generally open' to the public." *Id.* "Once a forum is opened up to assembly or speaking by *some groups*, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.* The dissent concluded that "since the broad 'welfare of the community' standard and the actual use of the facilities, rather than the district's exclusion of three categories of speech, determine the type of forum" it was obvious that the school board had created a public forum subject to strict scrutiny review. *Id.* at 7.

B.

The Tenth Circuit Has Erroneously Adopted The Second Circuit's Forum Analysis.

The cancer that is eating away at the First Amendment has also spread to the Tenth Circuit. In *Summum v. Callaghan* 130 F.3d 906 (1997), a county denied a church's request to erect a religious monolith display near a Ten Commandments monolith located on the front lawn of the county courthouse. The Court adopted the Second Circuit's flawed public forum doctrine by recognizing a subcategory to the designated public forum, called a limited public forum, subject to a reasonableness standard. *Id.* at 915. By allowing for the circuits to create a new classification of fora, the limited public forum as a subset of the designated public forum, the stage is set for state actors to openly discriminate against religious expression while only having to comply with a reasonableness standard.

III.

THE PROPER CONSTITUTIONAL FRAMEWORK OF THE PUBLIC FORUM DOCTRINE.

This Court should maintain the three classifications of public fora, as described in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). There are three classifications of public fora: (1) a traditional public forum, (2) a designated public forum, and (3) a nonpublic forum. Traditional public fora include streets, parks and places that "by long tradition ... have been devoted to assembly and debate." *Id.* at 45. Restrictions on speech in a traditional public forum are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." *ISKCON v. Lee*, 505 U.S. 672 (1992). In addition, reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46.

A designated public forum consists of public property which the state has generally opened, either by policy or practice, for the general public as a place for expressive activity or indiscriminate use. Even though a state is not required to open a public forum, a state may not enforce content-based exclusions from a forum *generally* open to the public unless the restrictions serve a compelling state interest and is narrowly drawn to achieve that interest. A designated public forum may be created for a limited purpose such as use by certain groups or for the discussion of certain subjects. *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 806 (1985); *Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976). However, subject matter

exclusions must be subject to strict scrutiny. Reasonable time, place and manner regulations are permissible if they are narrowly tailored to serve a significant government interest and if they leave ample alternative channels of communication open. *See Perry Educ. Ass'n.*, 460 U.S. at 45-46.

A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. *See id.* at 46. "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 129. However, any restriction must be construed in light of the purpose to which the property was "lawfully dedicated." For example, if the property is *generally* open to the public for civic, recreational, and community welfare uses, then it is not a limited, nonpublic forum. In such a nonpublic forum, the government may make distinctions in access on the basis of subject matter and speaker identity only if the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Id.* at 49. For example, in *ISKCON v. Lee*, this Court held that an airport was a nonpublic forum and that any restrictions on access only had to be reasonable in light of the purpose of the forum and viewpoint neutral. *See* 505 U.S. at 672.

In determining whether a forum is a designated public forum or a nonpublic forum, the courts should not engage in a "counting" exercise. Just because a state has opened its facilities to only ten groups does not mean that the forum is nonpublic and limited. When a state has opened its facilities to nine out of ten subject matters, then the proper exercise for the courts is to determine if excluding the tenth subject matter is supported by a compelling governmental interest and narrowly tailored to achieve that interest. This is the only way to keep the vibrancy of the designated forum. This Court should not engage in counting the number of subject matters permitted to

determine whether the forum is a designated or nonpublic forum. To be "generally" opened to the public does not require a mathematical subject matter count.

By using the public forum doctrine adopted by the Second Circuit, state actors are allowed to make an end-run around the First Amendment, and are essentially given a green light to discriminate based on speech content. The state actor in the Second Circuit may open the use of its facilities to any subject matter, except the subject matter with which it disagrees. For example, in the present case, the Milford Central School has opened the use of its facilities to essentially any subject matter, except religion. New York law states that the district facilities may be used for "holding social, civic, and recreational meeting and entertainment events and other uses pertaining to the welfare of the community." However, "school premises shall not be used by any individual or organization for religious purposes." *See Good News Club*, 202 F.3d at 503-04. It is difficult to imagine a use that would not fit under the description of "pertaining to the welfare of the community." Consequently, by specifically omitting anything with a religious purpose, yet opening up its facilities to the general public for anything pertaining to the welfare of the community, Milford Central School has made an end-run around the Constitution and has discriminated against religious speech. By declaring that the forum created by Milford Central School District is a limited forum, the Second Circuit has essentially eliminated the designated public forum category.

Applying the proper constitutional framework to the case at hand results in the Milford Center School's exclusion of the Good News Club to be found unconstitutional. First, when Milford Central School opened its facilities to the general public for "uses pertaining to the welfare of the community", the forum had been "generally open" to the public, and a designated public forum was created. In order for the exclusion of the

Good News Club to be upheld, the exclusion must serve a compelling governmental interest and be the least restrictive means of accomplishing that interest. Milford Central School does not have a compelling interest to exclude the Good News Club. Their only possible interest is to avoid an Establishment Clause violation, which this Court has rejected as a valid reason to deny free speech rights to religious organizations. *See Rosenberger*, 515 U.S. at 839; *Capitol Square Review Advisory Bd. v. Pinette*, 515 U.S. 753, 762 (1995); *Lamb's Chapel*, 508 U.S. at 392; Even assuming that the state has a compelling interest to exclude the Good News Club (which it clearly does not), total exclusion of any group with a "religious purpose" is not the least restrictive means of achieving that interest. Consequently, the exclusion of the Good News Club violates the First and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be reversed.

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The Good News Club, et al.,
Petitioners,

v.

Milford Central School,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States.

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada – The oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America – The nation's largest grassroots Orthodox Jewish organization, with chapters and affiliated congregations in numerous Jewish communities throughout the United States and Canada. Among its other activities, Agudath Israel sponsors adult education programs and youth gatherings on Jewish religious themes.

- National Council of Young Israel – A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the amicus curiae, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

- The Rabbinical Alliance of America – An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America – The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis. The organization is deeply involved in issues related to religious freedom.

- Torah Umesorah-National Society for Hebrew Day Schools – The coordinating body for more than 600 Jewish Day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") – The largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

The burgeoning of the Orthodox Jewish population in many areas of this country over the past several decades has led to the establishment of a great many new congregations and an exponential increase in the membership of existing ones. This has given rise, in turn, to an increasingly frequent scenario in which school districts are approached with a request for the temporary use of their buildings on Friday evenings and Saturdays by either newly formed congregations that have no permanent home as of yet or established synagogues that are undergoing structural expansions or repairs.

In addition, community-wide lectures and symposia of a religiously inspirational or educational nature are prominent features of Orthodox Jewish communal life. The sponsors of these gatherings often seek to hold them in local public schools during non-school hours. In many instances these are the only neighborhood-based facilities capable of accommodating the large turnouts these events draw.

The availability of public school facilities at times when they are not in use for academic instruction for these types of religious services and programs is especially necessary on the Jewish Sabbath and Holidays, when travel by car is religiously prohibited by Jewish law. Thus, to take but one common example, when an Orthodox congregation is temporarily unable to use its synagogue building because of repairs or because it has been damaged by a fire or a natural disaster, its congregants will not be able to attend Sabbath services – a central component of Jewish religious life – unless an alternate facility is available to them within walking distance. Often the only facility available in the proximate vicinity is the local public school building. Hence the Orthodox Jewish community has a special stake in ensuring that public school facilities are accessible to religious groups for religious gatherings.

This case presents an opportunity for the Court to clarify the constitutionality of the use of governmental property by private groups not only for educational programs with religious content, but also for explicitly religious purposes like communal worship services that address the spiritual and social needs of communities like ours. We respectfully make this *amicus curiae* presentation, upon the consent of the parties, to express our view that the Free Speech Clause of the United States Constitution mandates that access to public facilities when they are not being utilized for their public purpose must be granted equally to those wishing to utilize such areas for the full range of religious practice.

ARGUMENT

THE MILFORD SCHOOL DISTRICT'S RESTRICTION IS UNREASONABLE, AND THEREFORE UNCONSTITUTIONAL, BECAUSE A PUBLIC SCHOOL MAY NOT EXCLUDE SPEECH SO AS TO AVOID AN "IMPRESSION" OF "ENDORSEMENT OF RELIGION" THAT IS, IN FACT, FALSE

The majority of the Second Circuit panel below concluded that the Milford Central School District's policy prohibiting use of school premises "for religious purposes" was not unreasonable and did not amount to viewpoint discrimination. 202 F.3d at 509-511. We join in the view elaborated in the briefs of petitioners and other *amici* that the distinctions drawn by the between various forms of religious expression are not only unduly artificial and ill-defined, but result in the very kind of entanglement of government and religion that the Religion Clauses are designed to obviate.

Denial of access such as that at issue extends beyond the question of viewpoint discrimination, however, and must also be tested by a standard of reasonableness. See *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995); *Cornelius* v. *NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985). This issue received short shrift in the decision below but merits closer consideration; it will be the exclusive focus of this *amicus* presentation.

In *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), this Court struck down a New York school district's rule barring religious uses of school property as applied to an evangelical church's film

presentation on family values from a Christian perspective. The Court noted that the Second Circuit, which had upheld the school district, had "uttered not a word in support of its reasonableness holding. . . . If [the rule] were to be held unreasonable, it could be held facially invalid, that is, it might be held that the rule could in no circumstances be applied to religious speech or religious communicative conduct." *Id.* at 391 n. 6.

In *Bronx Household of Faith* v. *Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997), Circuit Judge Miner – who had authored the Second Circuit's decision in *Lamb's Chapel*, and who also wrote the opinion in this case – sustained a New York City school district's refusal to allow a church group to use a public school facility for religious worship services. In his *Bronx Household* opinion, Judge Miner said (127 F.3d at 214):

> We were faulted in *Lamb's Chapel* for "utter[ing] not a word in support of [our] reasonableness holding," *Lamb's Chapel*, 508 U.S. at 393 n. 6, in regard to the regulation in that case. We think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship. We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church. We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating their school as a church. And we think that it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services. Education, after all, is a particularly important state

> function, and the use of school premises is properly a matter of particular state concern. Finally, it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City.

In this case Judge Miner upheld the argument that it was reasonable for the Milford School District to "ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof." He cited his earlier opinion in *Bronx Household* as precedent that "foreclosed" any contrary result. 202 F.3d at 509.

In fact, this Court has rejected the rationale upon which Judge Miner has now relied twice. It has held that a *false* "impression" that the public may have that government is "endorsing" private religious expression is not a reason to discriminate against speech or religion. In *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981), the Court expressly rejected the notion that the need to prevent a perception of establishment justified barring the use of school property by religious groups. The Court has reiterated its view that "schools do not endorse everything they fail to censor" (*Lamb's Chapel*, 508 U.S. at 396), in a series of decisions involving the use of public property or funding for religious purposes. See *Board of Education of Westside Community Schools (District 66)* v. *Mergens*, 496 U.S. 226, 250 (1990); *Lamb's Chapel, supra*; *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 841 (1995).

So long as the conditions under which public property is used reflect governmental neutrality, its use for religious purposes is permissible. When religious uses occur after school hours and are open to the public, and the premises are similarly used by a broad array of private secular groups,

"the posited fears of an Establishment Clause violation are unfounded." *Lamb's Chapel*, 508 U.S. at 395.

The constitutionally protected religious speech of a private group such as the petitioner should not be sacrificed to a governmental authority's speculative concern about a possible *mis*impression that might be harbored by some students or members of the public. Error and falsity are not grounds for suppressing speech or religion. As a plurality of this Court stated in *Capitol Square Review and Advisory Board* v. *Pinette*, 515 U.S. 753, 765-66 (1995), "given an open forum and private sponsorship, erroneous conclusions [of state endorsement] do not count . . . . Private religious speech cannot be subject to veto by those who see favoritism where there is none."

Moreover, there are steps a school district can take to avoid even the mistaken impression of endorsement. This Court recognized as much in *Board of Education* v. *Mergens*, 496 U.S. 226,251 (1990): "To the extent a school makes clear that its recognition of [a religious club] is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." The Seventh Circuit has observed that the "proper response is to educate the audience rather than squelch the speaker" – particularly so in a school setting, since "[d]ealing with misunderstandings – here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement – is . . . what schools are for." *Hedges* v. *Wauconda Community School District 118*, 9 F.3d 1295, 1299 (7th Cir. 1993).

The ability of students of elementary, junior and senior high school ages alike to differentiate between government-sponsored speech and privately sponsored speech that is permitted by government in a public or limited

public forum has been acknowledged by various courts in cases involving after-hours religious activities for students at the public schools they attend. See *Sherman* v. *Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993) (elementary school); *Good News/Good Sports Club* v. *School District of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (junior high school); *Mergens*, *supra*, 496 U.S. at 250 (senior high school).

These decisions repudiate the Second Circuit's view in *Bronx Household* that "it is reasonable for [state legislators and school authorities] to consider the effect upon the minds of middle school children of designating their school as a church" (127 F.2d at 214) and its consequent conclusion in this case that it was "eminently reasonable" for Milford to close its public school buildings to the Good Faith Club for fear of "communicat[ing] to students of other faiths that they were less welcome than students who adhere to the Club's teachings." 202 F.3d at 509.

In the instances that concern this *amicus*, as elaborated at pages 2-3 *supra*, the contemplated worship services or religious instruction take place in the evenings or on weekends. The participants are members of the general population. Under these circumstances, even the attenuated link between school and religion that might be thought to be present in the context of an after-school religious club for students is non-existent. See *Deeper Life Christian Fellowship* v. *Board of Education of the City of New York*, 852 F2d 681, 686 (2d Cir. 1988). To the extent that the Milford policy purports to prohibit *all* religious uses of public school buildings – even evening and weekend uses that are not targeted toward students – the policy clearly extends far beyond anything that might remotely be considered reasonable.

Finally, we note that this is the second time in less than a decade that this Court is being called upon to address

a New York school district's policy concerning religious uses of public school facilities. It is noteworthy that the state statute upon which the Milford policy is based (and upon which the challenged policy in *Lamb's Chapel* was based), New York Education Law §414, is silent with respect to religious uses.

That statutory silence was interpreted in *Trietley* v. *Board of Education of the City of Buffalo*, 65 A.D. 2d 1 (4th Dept. 1978), as flatly prohibiting religious uses of public school property. Under this state court reading of the statute, New York's legislature has opened public schools to many and diverse uses, but not all. Among the permissible uses of these sites are those that are for the purpose of "instruction in any branch of education, learning or the arts" and, more broadly, "other uses pertaining to the welfare of the community." N.Y. Education Law § 414 (1)(a), (c).. *Trietley*, however, apparently did not regard the study of religion as a "branch of education [or] learning" such that it would come within the ambit of §414(1)(a). Nor was that decision prepared to recognize that a worship service could be seen by its sponsors as redounding to the "welfare of the community" on a par with the social, civic and recreational meetings and entertainments referred to in §414 (1)(c).

Trietly's reading of the statute to prohibit any and all religious uses of public school facilities is plainly inconsistent with *Lamb's Chapel,* which was decided 15 years after *Trietly*. *Trietly's* gloss on Section 414 renders the statute facially unconstitutional – as this Court noted in *Lamb's Chapel*, *supra*, 508 U.S. at 391 n.6 Hence the statute's constitutionality can be saved only if this Court reads Section 414 as permitting religious uses including religious instruction and worship.

The ongoing confusion surrounding religious uses of public school facilities in New York should lead the Court to address the underlying statute head on – either by declaring it

unconstitutional, or by reading it in a manner that comports with constitutional principle.

CONCLUSION

For the foregoing reasons, COLPA respectfully submits that the Milford Central School District's policy with respect to religious usage of public school facilities and the New York statute upon which the policy is based do not meet the test of reasonableness. It may not constitutionally be applied to private groups seeking to use public school buildings in the evenings and on weekends for religious activities targeted at members of the community at large, rather than at students. The 2-1 decision of the Second Circuit panel below should be reversed.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 99-2036

THE GOOD NEWS CLUB, *et al.*,
Petitioners,

v.

MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari to United States Court of Appeals for the Second Circuit

BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS*

Solidarity Center for Law and Justice, P.C. is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human and civil rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U. S. Constitution or by

* Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice, P.C. files briefs as *amicus curiae* in litigation of importance to the protection of human and civil rights, particularly when the primary right of parents to direct the upbringing of their children in accordance with the dictates of their consciences is at issue.

The preferential public school access granted under Respondent's Community Use Policy to youth organizations that train children in deeply held moral or ethical beliefs about what are right or wrong attitudes and behaviors tends to establish a civic religion. The United States Court of Appeals for the Second Circuit decided that it was permissible for Respondent to distinguish between youth organizations that teach moral and character development from a "religious viewpoint" and youth organizations, like the Good News Club, that teach moral and character development through "religious instruction and prayer." This Court should reverse the Second Circuit's decision in favor of Respondent and insist that Respondent adopt a policy that respects the private, independent childrearing decisions of all parents, regardless of the particular deeply held moral, ethical, or religious belief system they use to form their children.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

SUMMARY OF ARGUMENT

Since early in United States history, constant attention has been paid to the important task of indoctrinating children in attitudes and beliefs that are deemed essential to the maintenance of a peaceful and productive democracy. The Establishment Clause of the First Amendment to the U.S. Constitution was designed to safeguard against government officials undertaking to dictate what "shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). States may not go beyond the teaching of civic knowledge and skills to the actual teaching of civic virtues that "stand on a right of self-determination in matters that touch individual opinion and personal attitude." *Id.*, 319 U.S. at 631.

What public school officials cannot do lawfully through the direct indoctrination of students during the school day cannot be done indirectly by providing preferential access to their school facilities for the training of children in a generally moral or ethical, as opposed to a specifically religious, belief system. The government may not establish "an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

In the present case, pursuant to a Community Use Policy that expressly forecloses the use of public school facilities for religious purposes, Respondent granted access to youth organizations, such as the Boy Scouts, Girls Scouts, and 4-H Club, to engage in "pure" moral and character development through "the discussion of secular subjects from a religious viewpoint." *Good News Club et al. v. Milford Central School*, 202 F.3d 503, 510 (2nd Cir. 2000) *cert. granted*, 121 S. Ct. 296 (2000). On the other hand, Respondent denied access to Petitioners to engage in Christian moral and

character development through "the discussion of religious material through religious instruction and prayer." *Id.* The United States Court of Appeals for the Second Circuit upheld this disparate treatment because the Christian viewpoint espoused by Petitioners "contains an additional layer" that makes "the activities of the Club fall clearly on the side of religious instruction and prayer" that could not be endorsed under the Policy. *Id.*

Based on past decisions of this Court regarding to what extent purely moral or ethical belief systems qualify as religions in the traditional sense, the distinction made by the Respondent and the Second Circuit between the religious nature of the two approaches to the moral and character development of children was erroneous. The training of children in deeply held moral or ethical beliefs about what is right and wrong is as religious in the traditional sense as the training of children in Christian moral or ethical beliefs on the same subject. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970) Regardless of whether they are taught from a "pure" or Christian viewpoint, such moral or ethical beliefs serve as the first principles of an ultimate reality that can have the effect of motivating children to adopt attitudes and conduct their lives in accordance with such beliefs. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 835-837 (1995)

Respondent's granting of access under the Community Use Policy to youth character and leadership development organizations that indoctrinate children in a moral or ethical religion unconstitutionally tends to establish a civic religion. Such a policy has the further effect of placing Petitioner's Christian faith at a competitive disadvantage in the formation of children relative to the various humanist religions advocated by influential statesmen, social scientists, education philosophers, and theologians throughout American history.

To remedy this injustice, this Court should insist that Respondent adopt a Community Use Policy that respects the principle of neutrality among religions and safeguards the private, independent choices of parents to have their children educated for democratic participation in a accordance with the dictates of their consciences. Petitioners should be granted access to Respondent's school facility to train children in the context of the Christian religion on equal terms with youth organizations that train children in the context of deeply held moral or ethical beliefs.

ARGUMENT

I. YOUTH DEVELOPMENT ORGANIZATIONS THAT TRAIN CHILDREN TO ADOPT DEEPLY HELD MORAL OR ETHICAL BELIEFS ABOUT WHAT IS RIGHT AND WRONG ARE ENGAGED IN THE PRACTICE OF A RELIGION.

Prior decisions of this Court provide a basis for determining whether youth development organizations that train children through the "discussion of secular subjects from a religious viewpoint" are, in fact, engaged in the practice of a religion. See *United States v. Seeger* 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). The precedent established by these cases make it clear that the pursuit of youth character and leadership development in the context of deeply held moral or ethical beliefs about what is right and wrong constitutes a religion.

A. Moral or ethical beliefs about what is right and wrong that are held with the strength of traditional religious convictions qualify as religious in the traditional sense.

During the Vietnam War, this Court examined the military service exemption claims of conscientious objectors who did

not belong to an orthodox religious sect. Section 6(j) of the Universal Military Training and Service Act exempted from combatant service in the armed services those who were conscientiously opposed to participation in war by reason of their religious training and belief. 50 U.S.C. App. 456(j) (1958 ed.) The Act defined the term "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but not including essentially political, sociological, or philosophical views or a merely personal code." *Seeger*, 380 U.S. at 165.

In *Seeger* this Court included within the scope of the term "religious training and belief" Seeger's "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." *Seeger* 380 U.S. at 166. Seeger cited such personages as Plato, Aristotle and Spinoza as support for his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense." *Id.* His belief was found to be sincere, honest, and made in good faith; and his conscientious objection to be based upon individual training and belief, both of which included research in religious and cultural fields.

Five years later, in *Welsh* this Court determined that Welsh was entitled to conscientious objector status. Unlike Seeger, who, in filling out his conscientious objector application, had put quotation marks around the word "religious," Welsh struck the word "religious" out entirely and later characterized his beliefs as having been formed "by reading in the fields of history and sociology." *Welsh*, 398 U.S. at 341.

This Court determined that Welshshould be granted an exemption because, although his moral and ethical views did not qualify as "religious" in the traditional sense, they were "held with the strength of traditional religious convictions." *Id.*, 398 U.S. at 342.

B. Moral or ethical beliefs are deeply held when they function as a religion in the life of the believer by imposing a duty of conscience to do what is right and to refrain from doing what is wrong.

The main purpose of the conscientious objector cases was to determine whether individuals who adhered to purely moral or ethical belief systems could satisfy the statutory requirement of having a "belief in a relation to a supreme Being involving duties superior to those arising from any human relation." In the cases where an objector did not believe in God, this Court examined the circumstances under which a moral or ethical code could constitute a force, parallel to a belief in God, that would preclude participation in the war.

This Court determined that deeply held moral or ethical beliefs occupy in the life of an individual a place parallel to that filled by God in cases where such beliefs impose upon the individual a duty of conscience to do what is right and to refrain from doing what is wrong. *Welsh* 398 U.S. at 340. In such instances, the moral or ethical beliefs serve as the first principles of an ultimate reality to which the holder of such beliefs aspires. *Rosenberger* 515 U.S. at 837.

Youth character and leadership development organizations that train children to embrace a moral or ethical ultimate reality to guide their lives are no less religious in the traditional sense than a Christian religious organization that advocates or rests upon a belief in a deity. Thus, in *Rosenberger* this Court indicated that a college policy that prohibited the use of student fees in support of a Christian organization likewise would have to prohibit the use of student fees in support of "essays by hypothetical student contributors named Plato, Spinoza, and Descartes" who believed in a non-theistic ultimate reality. *Rosenberger* 515 U.S. at 837-838. One of America's leading educators and

humanists, John Dewey, explained how a moral or ethical ideal could substitute for God:

> Suppose for the moment that the word "God" means the ideal ends that at a given time and place one acknowledges as having authority over his volition and emotion, the values to which one is supremely devoted . . . these ends, through imagination, take on unity. . . . Whether one gives the name "God" to this union, operative in thought and action, is a matter of individual decision. But the *function* of such a working union of the ideal and actual seems to me to be identical with the force that has in fact been attached to the conception of God in all the religions that have a spiritual content; and a clear idea of that function seems to me urgently needed at the present time.

J. Dewey, *A Common Faith*, 29, 35 (1934).

C. The moral and ethical beliefs of youth development organizations such as the Boy Scouts of America, Girl Scouts, and 4-H Club are deeply held.

Respondent has granted access under the Community Use Policy to local chapters of the Boy Scouts, Girl Scouts, and 4-H Club for the secular purpose of offering youth character and leadership development training. The main goals of these organizations are to promote "personal growth and development of leadership skills" (Boy Scouts), encourage young women to vow to "try . . . [t]o serve God and [their] country" (Girl Scouts), and help "to enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults" (4-H Club). *Good News Club*, 202 F.3d 503, 511 (2nd Cir. 2000). These goals evidence the fact that these organizations train children in the context of deeply held moral and ethical beliefs that are an express, integral, and long-standing part of their respective youth development programs.

Even if one ignores the fact that it would be impossible to train a Girl Scout to "serve God" without providing her religious instruction about God and what God expects from us, the purely moral and ethical beliefs expressed by the Girl Scouts program serve as an ultimate reality, parallel to belief in a deity, to which Girl Scouts are trained to aspire. These deeply held moral and ethical beliefs are reflected in the four program goals of the Girl Scout Program: developing self-potential, relating to others, developing values,[1] and contributing to society.

The Boy Scouts of America ("BSA") is a private, nonprofit organization. The mission of the Boy Scouts is "to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Boy Scouts of America et al. v. Dale*, ____ U.S. ____, 120 S.Ct. 2446, 2451-2452 (2000) To instill its shared values, BSA has adopted a "Scout Oath" and a "Scout Law" setting forth its central tenets.

The Scout Oath requires a member to pledge: "On my honor, I will do my best, To do my duty to God and my country and obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." The Boy Scout Handbook defines "morally straight," in the following manner:

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[1] The details pertaining to the Girl Scout program goal of "developing values" include:

> Girls will develop a meaningful set of values to guide their actions and to provide for sound decision-making. Girl Scouting will: Help girls develop meaningful values and ethics that will guide their actions. Foster an ability to make decisions that are consistent with girls' values and that reflect respect for the rights and needs of others. Encourage girls to reexamine their ideals as they mature.

Girl Scouts USA, *The Girl Scout Program* (2000). *See* http://www.gsusa.org/about/tgsp.html

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Boy Scouts of America et al., 120 S.Ct. at 2461.

Although BSA bylaws state that it is "absolutely nonsectarian in its attitude toward . . . religious training," Christian New Testament virtues serve as the foundation of the virtues comprising the Scout Law. The BSA strive to instill the following values in their members: trustworthy, obedient, loyal, cheerful, helpful, thrifty, friendly, brave, courteous, clean, kind, and reverent. The linkage between the Scout Law values and the Christian religion is evidenced by the publication by the BSA Editorial Board, early in the history of the American Boy Scout movement, of an official BSA edition of the New Testament. W. Murray, *Boy Scouts of America New Testament* (Est. 1925) The BSA New Testament included a listing of New Testament scriptures specifically relating to the twelve Scout Law virtues.[2]

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[2] The BSA New Testament sets forth the correlation between Boy Scout ultimate values and New Testament scripture in the following manner:

NEW TESTAMENT SCRIPTURES ON SCOUT LAW

A SCOUT IS TRUSTWORTHY Matt. 25: 14-30. Acts 5: 1-6
A SCOUT IS LOYAL Rom. 13: 1-7. Rev. 3: 7-13
A SCOUT IS HELPFUL Acts. 27: 27-44. Matt. 25: 34-36
A SCOUT IS FRIENDLY Mark 10: 46-52. Luke 10: 25-37
A SCOUT IS COURTEOUS Luke 7: 36-50. Luke 17: 11-19
A SCOUT IS KIND Luke 15: 1-7. Heb. 13: 1-6
A SCOUT IS OBEDIENT Matt. 4: 18-22. Matt. 7: 24-27
A SCOUT IS CHEERFUL Matt. 5: 1-12. Phil. 4: 10-20
A SCOUT IS THRIFTY John 6: 12-14. 1 Tim. 6: 17-19
A SCOUT IS BRAVE 2 Tim. 4: 5-8. Luke 22: 54-62

The religious roots of the stated missions and values of the Boy Scouts, Girl Scouts, and 4-H Club, the solemnity with which they are subscribed to by their organizational leaders and participants, the time and personal sacrifices that must be made to successfully participate in these programs, the personal bonds between group participants, and the overriding institutional concern for training children to be strong in ideals and character provide overwhelming evidence that the moral and ethical beliefs of these organizations impose a duty of conscience to do good and refrain from doing wrong. For this reason, the beliefs of these organizations function as a religion in the lives of their members and are deeply held from an Establishment Clause perspective.

II. GRANTING PUBLIC SCHOOL ACCESS TO YOUTH DEVELOPMENT ORGANIZATIONS FOR THE MORAL OR ETHICAL TRAINING OF CHILDREN WHILE DENYING ACCESS TO YOUTH DEVELOPMENT ORGANIZATIONS FOR THE CHRISTIAN RELIGIOUS TRAINING OF CHILDREN UNCONSTITUTIONALLY TENDS TO ESTABLISH A CIVIC RELIGION.

The first clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state]

A SCOUT IS CLEAN Matt. 5: 27-32. James 1: 19-27
A SCOUT IS REVERENT Phil. 2: 1-11. 1 Cor. 8: 1-13

religion or religious faith, or tends to do so.'" *Lee v. Weisman* 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

A. Granting access to youth development organizations for the training of children based on deeply held moral or ethical beliefs while denying petitioners equal access for the training of children based on deeply held Christian religious beliefs has a primary effect of advancing religion.

Respondent must not discriminate against Petitioners on the basis of their deeply held Christian religious beliefs about the secular subject of youth character and leadership development. For Respondent to continue to do so has an impermissible primary effect of advancing the religion of organizations that teach youth character and leadership development in the context of deeply held moral or ethical beliefs.

(a) *The preferential access granted under the Community Use Policy to organizations that teach youth character and leadership skills in the context of deeply held moral or ethical beliefs results in the governmental indoctrination of children in an ethical religion.*

This Court has acknowledged "that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system." *Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). The legal fact remains, however, that public schools cannot be used to indoctrinate children in what the government, from time to time, considers as the moral or

ethical values that are essential to realizing the ultimate democratic reality. "The State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 631 (1943) (quoting *Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, C.J., dissenting)). Nevertheless, the state may not go beyond the teaching of civic *knowledge* and *skills* to the actual teaching of civic *virtues* that "stand on a right of self-determination in matters that touch individual opinion and personal attitude." *Barnette*., 319 U.S. at 631.

Ignoring the limitations expressed by this Court in *Barnette*, many of America's public school districts either have begun to teach moral or ethical values throughout the school day or have begun to grant access to their school facilities to youth development organizations for the purpose of training students in the attitudes and behaviors that will make them "good" democratic citizens.[3]

"A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee v. Weisman*, 505 U.S. at 592. In *Lee*, this Court struck down a public school graduation ceremony policy that had permitted a Rabbi-lead graduation exercise benediction which had asked God to help each attendee "strive to fulfill what You require of us all: to do justly, to love mercy, to walk humbly." In comparison,

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[3] Some of the organizations that are at the forefront of the most recent national character education movement include the Character Education Partnership, The Communitarian Network, Center for the Fourth and Fifth Rs, Character Education Institute, Jefferson Center for Character Education, Josephson Institute of Ethics, Institute for Global Ethics, Association for Moral Education, Center for the Advancement of Ethics and Character, and the Character Counts! Coalition.

Respondent has selectively made its public school available to youth development organizations the participants in which are trained to revere God; to serve God; to serve others; to develop meaningful values and ethics that will guide their actions; to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults; and to be, among other things, trustworthy, loyal, helpful, friendly, courteous, kind, obedient, and morally straight. In most cases, the participants in each of these groups wear the same type of uniform, learn the same history and dogma of their respective institution, participate in official ceremonies marking their passage into higher orders of merit, and engage in weekly meetings. The group leaders are thoroughly trained in the tenets of the their organization's moral or ethical religion and in child development techniques. The organizations have long-standing policies and procedures, a hierarchy of institutional officials and offices, and engage in professional fundraising efforts.

If this Court can strike down a once-a-year, one minute graduation benediction that merely asks God for help "to do justly, to love mercy, to walk humbly," then Respondent's policy of granting exclusive school facility access for the holding of weekly meetings of youth character and leadership development organizations that formally, pervasively, and professionally indoctrinate children in deeply held moral or ethical beliefs must meet with the same fate.

Such a determination cannot be avoided by arguing that such meetings are voluntary. In point of fact, the potential exists that parents who would otherwise enroll their children in the Christian Good News Club may choose to enroll their children in more convenient meetings of moral or ethical youth development organizations who have been granted access to the public school by Respondent. As this Court observed in *Sherbert v. Verner*, where one's "ineligibility for benefits derives solely from the practice of her religion," the

"pressure upon her to forgo that practice is unmistakable." Such a state of affairs "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning . . . the precepts of her religion in order to accept [them], on the other hand." 374 U.S. 398, 404 (1963).

Further potential for governmental indoctrination of children arises from the fact that the inherently religious nature of the moral or ethical belief systems of the "favored" youth development organizations makes it likely that group leaders will intentionally or inadvertently indoctrinate children. Because many of these leaders may have learned the foundational moral and ethical values of these groups in the context of traditional Judeo-Christian religious instruction and worship, there will be a significant likelihood for transference of some traditional religious teachings and practices, such as scripture lessons, songs, religious holiday celebrations, and forms of prayer, to the Boy Scout, Girl Scout, or 4-H Club setting.

Unlike a teacher who is permitted to provide secular remedial education to disadvantaged children in parochial schools (see *Agostini v. Felton*, 521 U.S. 203 (1997)) or a sign language interpreter who is permitted to work on behalf of a deaf student in a Roman Catholic high school (see *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)), Boy Scout, Girl Scout, and 4-H Club group leaders indoctrinate group members in inherently religious moral and ethical beliefs concerning the very meaning of, and means to, a life lived in service to God and neighbors. This Court has stressed "the obvious observation that 'adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.'" *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 120 S.Ct. 2266 (2000) (quoting *Lee*, 505 U.S. at 593).

The exclusive public school access granted by Respondent for the moral and ethical training of children leaves the public with the impression that Respondent endorses such religious indoctrination.

(b) *The ascertainment by Respondent of the source and content of the deeply held moral, ethical, or religious beliefs of applicants under the Community Use Policy creates an excessive entanglement between government and religion.*

To assess entanglement, this Court looks to the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and religious authority. *Agostini*, 521 U.S. at 232-33; *Lemon v. Kurtzman*, 403 U.S. 602, 614-615 (1971).

The youth character and leadership development programs of organizations such as the Boy Scouts, Girl Scouts, and 4-H Club are inherently religious in that their ultimate goal is to indoctrinate children in deeply held moral and ethical beliefs that impose upon the participants a duty of conscience to do what is right and to refrain from doing what is wrong. Implementing the Community Use Policy in a manner that distinguishes between youth development organizations that train children in the context of moral or ethical beliefs and those that do so in the context of traditional religious beliefs excessively entangles Respondent with religion.

In examining the constitutionality of government aid programs, courts "must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Welsh*, 398 U.S. at 357 (Harlan, J., opinion) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., opinion)).

By granting access to its public school to organizations for the character and leadership development of youth, Respondent is furthering the legitimate secular purpose of training children for peaceful and productive democratic participation. However, there is no greater internal threat to peaceful and productive democratic participation than for government agencies to grant selective aid exclusively to those opinion-shaping youth organizations that conform in content and practices to that which government officials prescribe as "orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette.*, 319 U.S. at 642. "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *Id.*, at 641.

The government "must be neutral in matters of religious theory, doctrine and practice" and "may not aid, foster, or promote one religion or religious theory against another." *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968).

The disparate treatment afforded under the Community Use Policy to different youth character and leadership organizations based on the religious nature of the source and content of their moral, ethical or religious beliefs completes a reversal of the roles and fortunes of the adherents to different religious theories of the parties in *Epperson* case. Thirty-two years ago, it was the adherents to a deeply held natural evolutionary belief system that were seeking access to public school facilities over the objections of those who believed deeply in a supernatural creationist theory of the origins of man. The evolutionists sought relief from this Court because the authorities deemed their beliefs not to be religious enough by traditional Christian standards.

In contrast, Christians seek relief from this Court because the authorities deem the source and content of their beliefs to be *too* religious by present secular standards. From the perspective of many Christians, what was once a vice is now a habit (and vice versa). In their view, while government aid flows in support of a "purely" moral and ethical *habit*, the "purely" religious *vice* goes begging. If Respondent is permitted to become excessively entangled in religion by denying the Good News Club because it adds an additional layer of Christian religious instruction and prayer to purely moral or ethical training, then evolutionary humanist Julian Huxley was prophetic when he wrote: "The time is ripe for the dethronement of gods from their dominant position in our interpretation of destiny, in favor of a naturalistic type of belief-system."[4] J. Huxley, *Religion Without Revelation*, 62 (1957 ed.)

In cases where a public school "regards its student clubs as a mechanism for defining and transmitting fundamental values," just as it is unconstitutional for the public school to grant public school access to a Christian club to the exclusion of other ideological organizations, it is unconstitutional to exclude a Christian club when public school access is granted to numerous other ideological organizations. *Westside Com-*

[4] Huxley, whose other titles relevant to the development of an evolutionary humanist religion include *Essays of a Humanist* (1961) and *The Humanist Frame* (1964), was the Director General of the United Nations Economic Security and Cultural Organization ("UNESCO") from 1946 to 1948. In a recent report, UNESCO officials called for a "holistic concept of education for a culture of peace," which would include "integrated comprehensive education covering human rights, democracy, international understanding, tolerance, non-violence, multiculturalism, and all other values conveyed through the school curriculum." *Final Report*, UNESCO Advisory Committee on Education for Peace Human Rights, Democracy, International Understanding and Tolerance, i (2000). The *Final Report* encourages the adaptation and dissemination of UNESCO teaching materials for peace, human rights, democracy, and tolerance.

munity Bd. of Ed. v. Mergens, 496 U.S. 226, 266-267 (1990) (Marshall, J., concurring).

The Equal Access Act, the extension of which to public secondary schools was the subject of *Mergens*, specifically prohibits discrimination against students groups on the "basis of the religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. 4071(a) (1984 version). It is instructive that, once a public high school opens its doors to the potential indoctrination of impressionable high school students, the Equal Access Act and this Court treat religious student groups and philosophical student groups as equals.

The Establishment Clause "prohibits misuse of secular government programs 'to impede the observation of one or all religions or . . . to discriminate invidiously between religions.'" *Gillette v. United States*, 401 U.S. 437, 462 (1971) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (Warren, C. J. opinion)). Because government discrimination between religions could have such a devastating effect on impressionable children, this Court has determined "we must remain sensitive, especially in our public schools, to the numerous subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others." *Mergens Bd. of Ed.*, 496 U.S. at 269 (Marshall, J., concurring) (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 627-628 (1989) (O'Connor, J., concurring)).

Respondent has become excessively entangled with religion by promoting moral or ethical "ideologies" regarding youth character and leadership development to the exclusion of a Christian religious "ideology" regarding the identical subject.

B. Granting access to youth development organizations for the training of children in deeply held moral or ethical beliefs while denying Petitioners equal access for the training of children in deeply held Christian religious beliefs tends to establish civic, scientific, evolutionary, ethical, or secular humanist form of a civic religion.

This Court has observed that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others." *Torcaso v. Watkins*, 367 U.S. 488, 496, fn. 11 (1961) citing *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (1957); *Fellowship of Humanity v. County of Alameda*, 315 P.2d 394 (1957).

Respondent's failure to extend community use of a school facility to Petitioners has the effect of providing natural moral or ethical humanist religions with a competitive advantage over supernatural religions in the formation of children in ultimate values deemed essential to peaceful and productive democratic participation. The continuation of such a system "encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise" of a purely moral or ethical nature. *Santa Fe Independent School Dist.*, 530 U.S., at 319, 120 S. Ct. at 2283.

Throughout American history, there have been attempts to advance natural moral or ethical belief systems as the foundation for a state-sponsored civic religion.[5] In most

[5] Thomas Jefferson wrote his own version of the Bible in an attempt to rescue the "diamond" of primitive, Unitarian Christianity from the "dunghill" of Trinitarian Christianity. In his opinion, "the innocent and genuine character" of Jesus needed to be rescued "from the imputation of imposture, which has resulted from artificial systems, invented by ultra-Christian sects, unauthorized by a single word ever uttered by Him." According to Jefferson, these "artificial systems" included:

> "The immaculate conception of Jesus, His deification, the creation of the world by Him, His miraculous powers, His resurrection and visible ascension, His corporeal presence in the Eucharist, the Trinity, original sin, atonement, regeneration, election, orders of Hierarchy, etc."

T. Jefferson, "Letter to William Short" (October 31, 1819) in *The Life and Selected Writings of Thomas Jefferson*, 633 (1993).

instances, these various forms of humanist religions have been developed out of pedagogical concern for the training of young Americans to become willing and able participants in the American democratic system.[6]

During and for the two decades following World War I, the focus of the proposed civic religion shifted from a form of deist humanism to a civic humanism that indoctrinated immigrants, particularly German and Irish Catholics, in Protestant-American morals and ethics. Youth development organizations such as the Boy Scouts of America and the YMCA played an important role in this indoctrination process.[7]

[6] Horace Kallen provides an explanation of the development of humanism through its various stages. Kallen describes the essential features of Rousseau and Jefferson's deistic humanism; Auguste Comte's positive humanism; Matthew Arnold and Irving Babbitt's new humanism; John Dewey's scientific humanism; Felix Adler's ethical humanism; Julian Huxley's evolutionary humanism; and Kallen's secular humanism. H. Kallen, *Secularism is the Will of God*, 198-218 (1954).

[7] Boy Scouts of America historian David MacLeod has explained that:

> If Boy Scout leaders as a group had a level of ultimate concern, it was Americanism rather than religious faith, for Protestants had long identified their values with Americanism, and the priorities were easily reversed. . . . The BSA, in other words, upheld what recent scholars have labeled a "civil religion"—not as a prophetic faith standing in judgment upon actual American practices but as a

Civic humanism reached its zenith as a state-sponsored civic religion in the years leading up to and covering the first few years of World War II. American children were indoctrinated in democratic values like honesty, sacrifice, respect for God, love of Country, duty, patriotism, trust, loyalty, and freedom—all of which were viewed as essential ingredients in the formation of good citizens. The American flag was seen as the embodiment of these democratic virtues and it was the successful contest to West Virginia's compulsory flag salute statute in this Court's *Barnette* decision that was largely responsible for the decline of civic humanism as America's official civic religion.

In 1934, one of America's leading education philosophers, John Dewey, attempted to move beyond a normative civic humanism to advocate a "common faith" based on "distinctively religious values inherent in natural experience." J. Dewey, *A Common Faith*, 20. In Dewey's scientific humanist[8] view, the development and practice of such a natural, common faith would help undermine the "claim on the part of the religions to possess a monopoly of ideals and of the supernatural means by which alone, it is alleged, they can be furthered." *Id.* at 19. Dewey felt that his "common faith" could serve as a civic religion because it emancipated the religious qualities and values inherent in human experience from any dependency on the "God of theism" or "the whole notion of special truths." *Id.* at 23.

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celebration of the American way of life, in which a decent measure of religiosity plays an important but subordinate role.

D. MacLeod, *Building Character in the American Boy: The Boy Scouts, YMCA, and Their Forerunners, 1870-1920*, 176 (1983).

[8] "There is but one sure road of access to truth—the road of patient, cooperative inquiry operating by means of observation, experiment, record and controlled reflection." J. Dewey, *A Common Faith*, 23 (1934).

Dewey rejected "religion" as signifying "a special body of beliefs and practices having some kind of institutional organization," in favor of "religious" as denoting "attitudes that may be taken toward every object and every proposed end or ideal." *Id.* at 8. The present-day distinction made by Respondents between the "discussion of religious material through religious instruction and prayer," for which access was denied, and the "discussion of secular subjects from a religious viewpoint," for which access was granted, has the effect of establishing Dewey's scientific humanism as a civic religion.

During the first half of the twentieth century, practitioners of Felix Adler's Ethical Culture religion[9] were rejecting Dewey's practical scientific humanism in favor of a more idealistic ethical humanism the spiritual ideal of which was to "seek to elicit the best in others, and thereby you will bring to light the best that is in yourself." F. Adler, *Reconstruction of the Spiritual Ideal*, 56 (1923).

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[9] The American Ethical Union ("AEU") has a Statement of Purpose that includes the following definition of Ethical Culture:

> Ethical Culture is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society.
>
> The AEU affirms and promotes the following principles which it considers to be integral to the Ethical Movement:
>
> 1. Every person has inherent worth; each person is unique.
> 2. It is our responsibility to improve the quality of life for ourselves and others.
> 3. Ethics are derived from human experience.
> 4. Life is sacred, interrelated and interdependent.

The American Ethical Union's State of Purpose and the four principles of the Ethical Movement are set forth in their entirety at http://www.ethicalculture.org/aeuves/purpose1.html and http://www.ethicalculture.org/aeuves/hist1.html

In the opinion of David Muzzey, an early advocate of the Ethical Culture religion, what the world needed was a "religion of humanity,"[10] which could be a "force for the redemption of the world from the hell of inhumanity into which it has fallen," if only churches would "abandon their outdated creeds and devote all their energies to the understanding and improvement of the nature of man and his institutions." D. Muzzey, *Ethics as a Religion*, 48 (1951). A personal God is not a condition for the construction of an ethical humanist religion along the lines of Ethical Culture since "instead of positing a personal God whose existence man can neither prove nor disprove, the ethical concept is founded on human experience." *Id.* at 95 (quoted in *Seeger*, 380 U.S. at 183).

By the early 1960s, Muzzey's ethical humanist civic religion model was considered too normative and unrealistic for use in youth character development in a modern and uncertain world. In 1963, Protestant theologian Paul Tillich, proposed that "the fundamental concept of religion is the state of being grasped by an ultimate concern." P. Tillich, *Morality and Beyond*, 30 (1963). For Tillich, love, not the particular symbols of thought and action of any traditional religion, should be the ultimate concern of separated persons who desire to enter into a unity community. In Tillich's view, in order to speak of one's ultimate concern, perhaps one "must forget everything traditional that [one has] learned about

[10] The French social scientist, Auguste Comte, was the first to call for the replacement of the religions of mankind by a Religion of Humanity. In Comte's religion, "Humanity would be the true God, the divine Whole that every one of its individual parts must learn to love and obey with a total faith." H. Kallen, *Secularization is the Will of God*, 202. The Bible of the Religion of Humanity consisted of works of poetry and fiction, science, history, philosophy and religion determined by Comte as apt to the propagation of the faith. *See* A. Comte, *The Catechism of Positive Religion* (1858).

God." P. Tillich, *The Shaking of the Foundations*, 57 (1948) (quoted in *Seeger*, 380 U.S. at 187).

Tillich, and the "death of God" advocates of secular humanism that followed in his path such as Bishop John A. T. Robinson,[11] Paul van Buren,[12] and Harvey Cox,[13] abandoned any notion of a normative civic religion in an American culture of the 1960s. For those who were being "honest" to God by trusting "the world, not God, to be our need fulfiller and problem solver," moral, ethical, and religious norms were to evolve solely in the relative context of one's worldly relations with their neighbor in the "secular city." J. E. Dirks, "The Death of God Theologies Today," in *Radical Theology and the Death of God*, 40 (1966).

One commentator on the movement to secularize Christianity described an endgame that is manifested in Respondent's preferential treatment of youth organizations that form children using a purely moral or ethical belief system: "Secular theology, in effect, tells us: The world for four centuries has been removing the shackles of superstition, religion, and quasi-religion. In the future it will purge itself further and may complete the purge. At the end of the process is a kind of serene, carefree agnostic who cares for others." M. Marty, "Does Secular Theology Have a Future?" in *The Great Ideas Today* (1967).

Respondent has penalized Petitioner for being too Christian in the moral formation of youth. Petitioner has dared to discuss Christian Gospel morals and values through Christian religious material (i.e. Bible lessons) and prayer. Meanwhile, Respondent has rewarded the Boy Scouts, Girl Scouts, and 4-H Club for discussing these same Gospel values from a

[11] J. Robinson, *Honest to God* (1963).

[12] P. van Buren, *The Secular Meaning of the Gospel* (1963).

[13] H. Cox, *The Secular City* (1965).

"secularized" religious standpoint. This disparate treatment affords advocates of secularized Christianity an unconstitutional competitive advantage for recruiting families to a faith that is an anathema to orthodox Christianity.

During the past forty years, national and international organizations have been created in an attempt to bring together followers of the different moral and ethical belief systems including scientific humanism, ethical humanism, and secular humanism.[14] The institutional presence of these humanist organizations in national and international religious affairs, including youth development programs, heightens the importance of the need to arrive at an equitable First Amendment policy- a policy that does not place traditional religions in the position of having to dilute the religiosity of their youth outreach efforts in order to compete for available state aid.

Ultimately, the success of any of the various humanist religions depends on the ability of its adherents to indoctrinate rising generations of potential followers in deeply held moral or ethical beliefs. Paul Kurtz, a co-president of the International Humanist and Ethical Union admits that "if humanism is to have any long-range impact on society, it must cultivate moral awareness by means of ethical education," an agenda that "depends on the schools." P. Kurtz, *Living Without Religion: Eupraxophy*, 139 (1994).

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[14] These organizations include the American Ethical Union, the Fellowship of Religious Humanists, the American Humanist Association, and Humanistic Judaism. These four organizations are members of an alliance called the North American Committee on Humanism which runs the Humanist Institute, publishes an annual journal called *Humanist Today*, holds annual meetings at which scholarly addresses are presented, seminars are held and business is conducted, and periodically mails out a newsletter to its members. The Humanist Institute offers a three-year graduate degree program that provides certification as a professional humanist leader. M. Olds, *American Religious Humanism* 190, 191 (1996).

The principals and values of Kurtz' ethical education agenda include character training and the cultivation of a compassionate regard for the needs of others. Thus, Kurtz' secular humanism, as do Jefferson's civic humanism, Dewey's scientific humanism, Huxley's evolutionary humanism, and Muzzey's ethical humanism, contemplates using the student attitude and behavior shaping capacities of the public schools to indoctrinate children in deeply held moral or ethical beliefs that are contrary Petitioners' deeply held Christian religious beliefs.

This Court has acknowledged the possibility that a civic religion constructed from the "common aspects of religions" might advance "the sense of community and purpose sought by all decent societies." *Lee*, 505 U.S. at 589-590. Nevertheless, this Court has rejected "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Id.*, at 590. Although a policy that grants preferential access to youth development organizations that teach children purely moral or ethical beliefs may be more of a "civic or nonsectarian" nature, such a policy "does not lessen the isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." *Santa Fe Independent School Dist.*, 530 U.S. at 312, 120 S.Ct. at 2277 (quoting *Lee*, 505 U.S., at 594).

C. In order to avoid an Establishment Clause violation, absent the provision of a legitimate threat to the health and safety of children, Respondents must grant public school access to all youth development organizations that train children to adopt deeply held moral, ethical, or religious beliefs about what is right and wrong.

Where a statute or government policy is defective because of underinclusion, a court may declare it a nullity and order

that its benefits not extend to the intended class, or it may extend coverage to include those who are aggrieved by exclusion. *Welsh*, 398 at 361.

In the present case, instead of voiding the entire Community Use Policy because it engages in "religious gerrymandering" in favor of deeply held *moral* or *ethical* beliefs, this Court should require an expansion of the Community Use Policy to include organizations that provide youth character and leadership training in the context of deeply held *religious* beliefs. In this way, neutrality of government aid can be ensured. Further, whether children are indoctrinated in the deeply held moral, ethical, or religious beliefs of a particular youth development program would depend solely on the voluntary, private, and independent decisions of parents who enroll their children in the program.

As recently stated by this Court:

> ". . . the religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient furthers the government's secular purpose. . . . If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what they constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to their children."

Mitchell v. Helms, ___ U.S. ___, 120 S. Ct. 2530, 2551 (2000).

These principles of neutrality and private choice can be applied to eliminate the indoctrination that is attributable to

the Respondents under the present formulation of the Community Use Policy. By offering assistance to recipients who offer moral, ethical, *and* religious youth development programs, Respondents cannot be thought responsible for any particular indoctrination. *Mitchell v. Helms*, 120 at 2256-57 Such government neutrality is further ensured by the fact that "numerous private choices, rather than the single choice of a government" will determine the granting of public school facility access pursuant to neutral eligibility criteria. *Id.* at 2541.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

THE GOOD NEWS CLUB, ET AL.,
Petitioners,

v.

MILFORD CENTRAL SCHOOL

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a public school that permits speakers to use its facilities after school hours to instruct "in any branch of education, learning or the arts," to "benefit the welfare of the community," and to "promote the morals of children," but forbids speakers whose speech it deems to be too religious from using its facilities, engages in viewpoint discrimination in violation of the Free Speech Clause of the United States Constitution.

2. Whether a governmental official's determination whether speech is "a discussion of morals from a religious viewpoint" (which is deemed to be permissible speech) or is "religious instruction" (which is deemed to be impermissible speech) unconstitutionally entangles the state with religion in violation of the Establishment Clause of the United States Constitution.

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BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

The States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Tennessee, Texas, Utah, and Virginia respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.4. The *amici* States submit this brief in support of Petitioners The Good News Club, Andrea Fournier, and Darleen Fournier.

INTEREST OF *AMICI CURIAE*

The *amici* States have a profound interest in protecting the free-speech rights and religious liberties of their citizens, and in ensuring that their public school officials have clear and reliable guidance when they face questions concerning the use of public property by religious organizations. The decision of the Second Circuit in this case, *Good News Club* v. *Milford Central School*, 202 F.3d 502 (2d Cir. 2000), *aff'g* 21 F. Supp. 2d 127 (N.D.N.Y. 1998), subjects religious speech to unconstitutional viewpoint-based discrimination and muddies the water in an important area of First Amendment law that this Court has previously made clear.

State and local school officials in the *amici* States have long relied on this Court's guidance in cases such as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), in adopting neutral policies governing the use of public school

facilities. *See, e.g.*, Office of the Attorney General, State of Alabama, *Guidelines for Religious Activities in Schools* (July 21, 2000) (reproduced in Appendix A);[1] Board of Educ., Commonwealth of Virginia, *Guidelines Concerning Religious Activities in the Public Schools* (June 22, 1995) and Office of the Attorney General, Commonwealth of Virginia, *Memorandum of Legal Principles Animating Guidelines* (Jan. 9, 1995) (reproduced in Appendix B); *see also* U.S. Dep't of Educ., *Religious Expression in Public Schools* (Rev. ed. May 1998) (reproduced in Appendix C). In following the course of neutrality, state and local officials have been assured by this Court's decisions that they could safely navigate between the Scylla of violating the Free Speech Clause and the Charybdis of violating the Establishment Clause when facing requests for use of public school facilities by religious clubs and organizations. The decision below in this case casts doubt on the Court's interpretation of neutrality, however.

This doubt leaves public officials in the *amici* States in the unenviable position of attempting to discern whether the previously certain course set by the principle of neutrality remains good law in all cases, or if it must be modified. This uncertainty leaves public officials open to lawsuits no matter what they decide when a religious club or organization requests to use school facilities. Finally, this case is of particular importance because Good News Clubs operate in all of the *amici* States. The *amici* States thus have an abiding interest in the resolution of this case.

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[1] The Attorney General of Alabama issued updated guidelines after the Court's decision in *Santa Fe Independent School District* v. *Doe*, 120 S. Ct. 2266 (2000).

SUMMARY OF ARGUMENT

At the heart of this case lies the neutrality commanded of the States by the Free Speech and Religion Clauses of the First Amendment. It is axiomatic that a State may not discriminate against speech based upon the viewpoint it espouses — even in a limited public forum. Over the past two decades, the Court has repeatedly held that this rule of neutrality applies with equal force to religious speakers, and the Establishment Clause does not justify governmental discrimination against them.

Respondent in this case permits non-school-sponsored clubs such as the Boy Scouts, Girl Scouts, and 4-H Club to use its facilities after school hours "to promote the moral and character development of children." Brief for Defendant-Appellee Milford Central School at 9, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). Petitioners, however, view morality and character development as "senseless without Christ." J.A. at P25 (Dep. of Steven Fournier), *quoted in* 202 F.3d at 509. Thus, the Good News Club and its speakers attempt to "promote the moral and character development of children" through Bible lessons, songs, prayer, and proselytizing.

Respondent refused to allow the Good News Club to use its facilities precisely because of the Club's religious views on morality and character development and the Club's views on the best means of promoting those civic virtues. This would appear to be a classic form of viewpoint discrimination, but the Court of Appeals ruled that the Club's religious activities — Bible stories, songs, prayer, etc. — changed the subject of the Petitioners' speech from "morality and character development" to "religious instruction" or "worship." This Court has at

least twice rejected such a distinction between "religious" speech and speech "about" religion.

A rule such as that adopted by the Court of Appeals is unworkable. In an age of religious pluralism, it could well prove impossible to determine what words or acts might constitute worship in a given religious tradition. The very attempt to decide that question, moreover, would unconstitutionally entangle the State with religion.

Censorship was not necessary to obey the Establishment Clause in this case. Petitioners' meetings were held after school, were not sponsored by the school, and were open to any child as part of a program in which many clubs met on school property. Given these facts, there was little potential that members of the community would perceive an endorsement of religion by Respondent. If Respondent remained concerned about the possibility of any confusion, it could have explained its neutrality to the school's parents and required the continued use of parental permission slips. If Milford was concerned about children being confused about the school's neutrality, it could take that as an opportunity for a first civics lesson, explaining its position in age-appropriate terms. Even young children understand the neutral role of umpires and referees in sports and playground games, and Respondent could have described its role in similar terms. The solution to Respondent's concern about an appearance of endorsement in this case was "more speech" with reasonable, viewpoint-neutral measures — not censorship.

Finally, public officials need clear guidance and workable rules to uphold the principle of governmental neutrality toward religion. Officials in the State and Federal governments have been attempting to provide clear, concise guidelines to assist public school officials in

discharging their constitutional duties. A key part of this guidance has been the explaining the fundamental principle of governmental neutrality toward religion. Neutrality is a principle that governmental officials can understand and apply. It is a principle governmental lawyers can explain.

A rule such as that adopted by the Court of Appeals frustrates efforts to underscore the importance of neutrality, sowing unnecessary confusion by requiring government to treat religious organizations less favorably than others. The decision of the Court of Appeals represents a substantial and troubling departure from the principle of governmental neutrality embodied in this Court's precedents concerning the rights of religious speakers in limited public fora created by public schools and universities. As such, the decision of the Court of Appeals must be reversed.

ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH THIS COURT'S PRECEDENT AND SANCTIONS GOVERNMENTAL SUPPRESSION OF SPEECH FROM A RELIGIOUS VIEWPOINT.

This case is strikingly similar to *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993). Both cases involve the same state statute, N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 2000). The school board policy creating the limited public forum in this case bears a remarkable resemblance to the policy at issue in *Lamb's Chapel*. *Compare* 508 U.S. at 387

(describing Center Moriches policy) *with* Pet. App. D1–D3 (Milford policy).[2] Without even mentioning *Lamb's Chapel*, however, the panel majority of the Court of Appeals held that Respondent's exclusion of the Good News Club from Milford's limited public forum for non-school-sponsored, after-school clubs was a permissible form of content discrimination, rather than unconstitutional viewpoint discrimination. *See* 202 F.3d at 509–11. One judge dissented, observing that he could not "square the majority analysis in this case with *Lamb's Chapel*." *Id.* at 513 (Jacobs, J., dissenting).

With its ruling, the Second Circuit — speaking through the author of the decision reversed in *Lamb's Chapel*[3] — attempted to revive reasoning rejected by this Court in that case and in *Widmar* and *Rosenberger*. In so doing, "[t]he neutrality commanded of the State by the separate Clauses of the First Amendment was compromised . . . ." *Rosenberger*, 515 U.S. at 845.

A. This Court Has Consistently Required Viewpoint Neutrality Toward Religious Speakers in Limited Public Fora Created by Public Schools and Universities.

In *Widmar* v. *Vincent*, this Court addressed the use of public university facilities by student religious organiza-

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[2]The parties agreed and the courts below held that Respondent had created a limited public forum through its community use policy. 202 F.3d at 509; 21 F. Supp. 2d at 153. This Court's decision last term in *Santa Fe Independent School District* v. *Doe* is thus inapposite here because the Court held that no public forum had been created in that case. 120 S. Ct. at 2275 & nn.12–13.

[3]*See* 202 F.3d at 504 (showing Judge Miner as author of opinion); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 383 (2d Cir. 1992) (same), *rev'd*, 508 U.S. 384 (1993).

tions. In *Widmar*, a State university refused to allow a religious student organization to use university facilities for "religious worship and discussion" even though the facilities were otherwise open to all registered student organizations. 454 U.S. at 269. The Court held that "religious worship and discussion" in a limited public forum "are forms of speech and association protected by the First Amendment," thus rejecting the dissent's suggestion "that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." *Id.* at 269 & n.6 (discussing *id.* at 283–86 (White, J., dissenting)).

Accordingly, the university's exclusion of private religious speech from its limited public forum could be justified only if it was "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Id.* at 270. The university argued that allowing religious organizations to use its facilities would violate the Establishment Clause. *Id.* at 270–71. The Court rejected that argument, however, holding that an "equal access" policy does not violate the Establishment Clause. *Id.* at 271–75; *see also Board of Educ. of Westside Community Schs. (Dist. 66)* v. *Mergens*, 496 U.S. 226, 235 (1990) (*Widmar* "held that an 'equal access' policy would not violate the Establishment Clause").

In *Lamb's Chapel* v. *Center Moriches Union Free School District*, the Court held that a school district engaged in unconstitutional viewpoint discrimination against a local church that had applied to show a film series on school property after hours. 508 U.S. at 390–97. The school district allowed community groups to use its facilities for "social, civic, or recreational uses." *Id.* at 387. It forbade, however, use of school facilities " 'by any

group for religious purposes.' " *Id.* (quoting policy). When a local church applied to use school property to show a film series addressing family, child-rearing, and cultural issues from a Christian perspective, the school district refused. *Id.* at 387–89.

The Court held that the exhibition of the religious film series in *Lamb's Chapel* "was denied solely because the series dealt with the subject from a religious standpoint." *Id.* at 394. The Court held that "denial on that basis was plainly invalid under our holding in *Cornelius* [v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)] . . . ." 508 U.S. at 394. The Court reiterated that " 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' " *Id.* (quoting *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). The Court thus held "that discriminating against religious speech was discriminating on the basis of viewpoint." *Rosenberger*, 515 U.S. at 832 (discussing *Lamb's Chapel*). Relying on *Widmar*, the Court in *Lamb's Chapel* also dismissed the school board's argument that permitting its property to be used for the film series would violate the Establishment Clause. 508 U.S. at 394–95.

In *Rosenberger* v. *Rectors & Visitors of the University of Virginia*, the Court again held that a public university could not discriminate against a religious organization based upon the views it wished to express in a limited public forum created by the university. The "forum" in *Rosenberger* was a student activities fund that paid the printing costs of " 'student news, information, opinion, entertainment, or academic communications media groups.' " *Id.* at 824 (quoting fund's Guidelines). The university refused, however, to pay the printing costs of a

student publication called "Wide Awake: A Christian Perspective at the University of Virginia." *Id.* at 826–27. The university denied the request because it considered Wide Awake a "religious activity," *id.* at 827, which was excluded by the fund's Guidelines, *id.* at 825.

The Court concluded that the university's denial of third-party payments to the Christian publication was "based upon viewpoint discrimination not unlike the discrimination the school district relied upon in *Lamb's Chapel* and that we found invalid." *Id.* at 832. The Court noted that "the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints." *Id.* at 831. The Court rejected the assertion that the university's discrimination was not viewpoint-based simply because it attempted to exclude all religious views. *Id.* at 831–32.

Finally, the Court rejected the assertion that the Establishment Clause required the university to exclude the Christian publication from its forum. *Id.* at 837–45. The Court noted that "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion," *id.* at 839, and held that the university's student activities fund was in fact "neutral toward religion," *id.* at 840. The Court emphasized that "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.* at 839 (citing *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274–75).

B. The Decision of the Court of Appeals Conflicts with *Widmar*, *Lamb's Chapel*, and *Rosenberger* and Censors Religious Speech.

The decision of the Second Circuit in this case conflicts with *Widmar*, *Lamb's Chapel*, and *Rosenberger*. It authorizes governmental officials to censor private speech to filter out views that are "too" religious. In the name of prohibiting "religious instruction" and "worship," the Court of Appeals empowered governmental officials to root out those views that do not "meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844.

Much like the Center Moriches policy in *Lamb's Chapel*, Respondent's policy allows district residents to use school facilities after hours for

> holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public.

Pet. App. at D1 (Milford "Community Use of School Facilities" Policy ¶ 3).[4]

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[4] The Center Moriches policy in *Lamb's Chapel* similarly permitted district residents to use school facilities after hours for

> social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with §414 (Rule 8). Rule 7, however, consistent with the judicial interpretation of state law, provides that "[t]he school premises shall not be used by any group for religious purposes."

Lamb's Chapel, 508 U.S. at 387 (citing and quoting Pet. App. at 57a).

Milford admits that it allows the Boy Scouts, Girl Scouts, and 4-H Club to use school property "to promote the moral and character development of children." Brief for Defendant-Appellee Milford Central School at 9, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). Respondent's admission on this point is certainly correct — as far as it goes. The 4-H Club states that one of the goals of its programs is "addressing youth and societal issues." Lodging at AA5. The 4-H Club's purpose "is to enable youth to develop knowledge, skills, abilities, attitudes, and behaviors to be competent, caring adults." *Id.*

Respondent fails, however, to acknowledge adequately the religious aspects of the clubs it allows to use its facilities. For example, part of the Girl Scouts' promise is "[t]o serve God." Lodging at Z2. At the Boy Scouts meetings, each member similarly pledges "[t]o do my duty *to God*." Lodging at Y9 (emphasis added). The Boy Scout Law states: "A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others." *Id.* The Boy Scouts "endeavor[] to develop American citizens who . . . have personal values *based on religious concepts* . . . ." *Id.* at Y7 (emphasis added). The Cub Scouts (a part of Boy Scouts) state that one of their purposes is to "[i]nfluence a boy's character development *and spiritual growth*." *Id.* at Y3 (emphasis added).

Petitioners have asserted that "because we are teaching morals from a Christian perspective, we would present that perspective, which is that these morals or these values are senseless without Christ . . . ." J.A. at P25 (Dep. of Steven Fournier). Thus, the Good News Club encourages the "moral and character development of children" through Bible lessons, games, songs, prayer, and proselytizing. In the opinion of the Court of Appeals,

this avowedly religious perspective distinguished the Good News Club from the Girl Scouts and Boy Scouts, although the Scouts also promote religious devotion. The Court of Appeals thought that the Good News Club's approach to morality, with its emphasis on Christian faith and devotion, was simply "too" religious to be allowed in Milford's facilities.

Under *Lamb's Chapel*, the "critical question" in this case should have been "whether it discriminates on the basis of viewpoint to permit school property to be used [by non-school-sponsored student clubs] for the presentation of all views about [the moral and character development of children] except those dealing with the subject matter from a religious standpoint." 508 U.S. at 393 (modified as indicated to reflect the facts of this case). Because Milford was already allowing the Scouts to address these topics "from a religious standpoint," however, the question really should have been whether it discriminates on the basis of viewpoint to exclude certain groups that address the subject matter of morality and character development from a standpoint that is "more" religious than that of other groups that are allowed to present their religiously-based views.

Instead of following *Lamb's Chapel* the Second Circuit followed its earlier decision in *Bronx Household of Faith* v. *Community Sch. Dist. No. 10*, 127 F.3d 207 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), which stated that "it 'is not difficult for school authorities to make' the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer.' " 202 F.3d at 510 (quoting *Bronx Household*, 127 F.3d at 215). The Court of Appeals concluded that the Good News Club's activities were "something other than simply

teaching moral values," that they did "not involve merely a religious perspective on the secular subject of morality," and that the Club went "far beyond merely stating its viewpoint." *Id.* at 510. According to the Court of Appeals, the Club's activities were not materially different from "religious worship." *Id.* (quoting *Full Gospel Tabernacle* v. *Community Sch. Dist. 27*, 979 F. Supp. 214, 217 (N.D.N.Y. 1997), *aff'd per curiam*, 164 F.3d 829 (2d Cir. 1999), *cert. denied*, 527 U.S. 1036 (1999)). The Court of Appeals thus held "that the Club's activities fall outside the bounds of pure 'moral and character development.' " *Id.* at 511.

This classification of the Good News Club's activities as unprotected "religious instruction" or "worship" was precisely the approach rejected by this Court in *Widmar*, 454 U.S. at 269–70 n.6, 272 n.11, and *Rosenberger*, 515 U.S. at 844–45. In *Widmar*, the dissent "argue[d] that 'religious worship' is not speech generally protected by the 'free speech' guarantee of the First Amendment and the 'equal protection' guarantee of the Fourteenth Amendment." *Id.* at 269 n.6 (citing *id.* at 284 (White, J., dissenting)). The Court rejected this attempt to "distinguish between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' constituting 'worship.' " *Id.* at 269 n.6 (quoting *id.* at 285 (White, J., dissenting).

The Court cited "at least three difficulties" with attempting to distinguish between religious "speech" and religious "worship" for purposes of First Amendment protection:

> First, the dissent fails to establish that the distinction has intelligible content. There is no indication when "singing hymns, reading scripture, and teaching biblical principles," cease to be

"singing, teaching, and reading" — all apparently forms of "speech," despite their religious subject matter — and become unprotected "worship."

Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction would require the university — and ultimately the courts — to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. . . . [I]t gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts than for religious worship by persons already converted. . . .

Id. at 269–70 n.6 (citations omitted) (quoting *id.* at 283 (White, J., dissenting)). In underscoring the risk of excessive entanglement of government with religion, the Court went on to observe that just "to determine which words and activities fall within 'religious worship and religious teaching' . . . could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Id.* at 272 n.11 (quoting *O'Hair* v. *Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979) (footnote omitted), and citing Lawrence Tribe, *American Constitutional Law* § 14–6 (1978)).

The Court reiterated these concerns in *Rosenberger*, quoting from *Widmar* at length. 515 U.S. at 845 (quoting 454 U.S. at 269–70 n.6). There, however, the argument was slightly different from that made by the dissent in *Widmar*. The dissent in *Widmar* argued that "religious worship" was not generally protected by the Free Speech Clause. 454 U.S. at 269 n.6. In *Rosenberger*, however, the university argued that the exclusion of the student publication due to its religious nature was legitimately based on the paper's content, not its viewpoint. 515 U.S. at 830. The Court rejected this argument. *Id.* at 831–32.

The Court later discussed the perils inherent in requiring government to discriminate between "religious" speech and speech "about" religion:

> Were the dissent's view to become law, it would require the University, in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question — speech otherwise protected by the Constitution — contain too great a religious content. The dissent, in fact, anticipates such censorship as "crucial" in distinguishing between "works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve." That eventuality raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. To impose that standard on student speech at a university is to imperil the very sources of free speech and expression. As we recognized in *Widmar*, official censorship would be far more inconsistent with the Establishment Clause's

> dictates than would governmental provision of secular printing services on a religion-blind basis.

Id. at 844–45 (quoting *id.* at 896–97 (Souter, J., dissenting)). The Court held that such censorship of student speech and thought "was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845–46.

The Second Circuit essentially followed the *dissents* in *Widmar* and *Rosenberger*, not the opinions of the Court, *cf. Widmar*, 454 U.S. at 283–86 (White, J., dissenting); *Rosenberger*, 515 U.S. at 896–99 (Souter, J., dissenting). The result was precisely the "specter" the Court feared in *Rosenberger*: Governmental officials scanned the Good News Club's materials, found that they did not meet the government's "baseline standard of secular orthodoxy," 515 U.S. at 844, and censored the Club's views on morality and character development.

II. REQUIRING PUBLIC OFFICIALS TO DISCRIMINATE BETWEEN PROTECTED RELIGIOUS "SPEECH" AND ALLEGEDLY UNPROTECTED "WORSHIP" OR "RELIGIOUS INSTRUCTION" IS UNWORKABLE AND UNCONSTITUTIONAL.

The Court of Appeals based its decision in this case on the premise that "it 'is not difficult for school authorities to make' the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer." 202 F.3d at 510 (quoting *Bronx Household*, 127 F.3d at 215). This conclusion, too, is inconsistent with the decisions in both *Widmar* and *Rosenberger*.

As the Court indicated in *Widmar* and *Rosenberger*, the distinction between "religious" speech and speech "about" religion lacks "intelligible content." *See Rosenberger*, 515 U.S. at 845 (quoting *Widmar*, 454 U.S. at 269 n.6). "There is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading' . . . and become unprotected 'worship.'" *Widmar*, 454 U.S. at 269 n.6 (citation omitted), *quoted in Rosenberger*, 515 U.S. at 845.

Because there is no principled basis for determining when "singing, teaching, and reading" become allegedly unprotected "worship" rather than protected "speech," the task of public officials across the Nation in implementing a rule such as that adopted by the Second Circuit would be exceedingly subjective and arbitrary. Rather than simply determining whether a religious organization's request to use public facilities was consistent with the purposes for which those facilities could be used, public officials would have to determine if the religious organization's activities would be "too" religious. One can imagine the kinds of questions public officials would find themselves asking: Will the members of this group sing religious songs? Will they pray? Will they read the Bible, Qur'an, Book of Mormon, or other scripture? Will they proselytize? If they sing and pray, but do not read scripture or proselytize, must they be excluded? What if they only sing? What if they only pray? Does the answer change based on the significance of each activity in the group's religious traditions? Finally, if public officials got the answer "wrong," they would be subject to suit and a court would then have to ask the same questions.

This Court acknowledged in *Widmar* that it could prove "impossible" "to determine which words and activities fall within 'religious worship and religious

teaching,' " in an age of religious pluralism. 454 U.S. at 272 n.11. More importantly, the Court held that "[s]uch inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270 n.6, *quoted in Rosenberger*, 515 U.S. at 845.

The *amici* States submit that, as this Court stated in *Widmar*, the kinds of inquiry necessitated by the decision of the Second Circuit will impermissibly entangle the State with religion. These inquiries would further lead to official hostility toward private religious expression. This hostility is inconsistent with the First Amendment.

III. CENSORSHIP OF PETITIONERS' RELIGIOUS VIEWS WAS NOT NECESSARY TO OBEY THE ESTABLISHMENT CLAUSE AND DISPLAYED GOVERNMENTAL HOSTILITY TOWARD RELIGION.

Respondent has maintained throughout this case that its discriminatory treatment of the Good News Club was necessary to obey the Establishment Clause. *See* Brief for Defendant-Appellee Milford Central School at 23–25, *Good News Club* v. *Milford Central Sch.*, 202 F.3d 502 (2d Cir. 2000) (No. 98-9494). This position fails to distinguish adequately between government speech and private speech about religion. Respondent's concerns about an appearance of governmental endorsement of the Good News Club's views could have been addressed through reasonable, viewpoint-neutral means that would not require censorship. By censoring Petitioners' views in a forum open to more secular clubs addressing the same subject matter, Respondent communicated governmental hostility, rather than neutrality toward religion. Such a message of hostility toward religion violates the First Amendment.

A. Censorship of Petitioners' Viewpoint Was Not Necessary to Obey the Establishment Clause.

In *Rosenberger*, the Court noted that "[m]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." 515 U.S. at 839 (citing *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274–75). As in *Rosenberger*, Respondent and the courts below failed adequately to distinguish " 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.' " 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250 (plurality opinion) (emphasis in *Mergens*)). By refusing to allow the Good News Club to address the "moral and character development of children" from its admittedly religious perspective, school officials censored the Club's private speech and silenced its viewpoint on moral development. Such censorship was not necessary to obey the Establishment Clause.

Respondent's concerns about an appearance of governmental endorsement of religion, while an important consideration, are overstated. As in *Lamb's Chapel*, the Good News Club's meetings "would not have been during school hours, would not have been sponsored by the school, and would have been open to" any child, not just Christian children or Club members. 505 U.S. at 395. As in *Lamb's Chapel*, Milford's "property had repeatedly been used by a wide variety of private organizations." *Id.* Given these facts, "there would have

been no realistic danger that the community would think that the district was endorsing religion or any particular creed, and any benefit to religion or to the church would have been no more than incidental." *Id.*

Any concern that children might misunderstand Milford's neutrality could be addressed using reasonable, viewpoint-neutral means. For example, Milford already required students to have parental permission to attend the Good News Club's meetings. *See* Lodging at X2. Such parental consent places "elementary children . . . on an equal footing with secondary school students" by incorporating parental maturity and decision-making in the process and by creating an opt-in program that reduces any appearance of endorsement to nonparticipants. *Herdahl* v. *Pontotoc County Sch. Dist.*, 933 F. Supp. 582, 590 (N.D. Miss. 1996); *see also Good News/Sports Club* v. *School Dist. of City of Ladue*, 28 F.3d 1501, 1509 n.17 (8th Cir. 1994) (noting use of parental permission slips), *cert. denied*, 515 U.S. 1173 (1995). In addition, Milford could have prohibited teachers attending Club meetings, so that there would be no association between the Club and authority figures employed by the school.

If Respondent was worried that parents or other adults might misunderstand the school's constitutionally mandated neutrality toward religion, it could explain its position to them. If the school were concerned that younger children still might be confused, it could use the opportunity as a first civics lesson and explain to them, in age-appropriate terms, its neutral position. Even young children understand the concept of neutrality from the role of referees and umpires in sports and playground games, and Respondent could describe its role in similar terms. *See also Good News/Sports Club*, 28 F.3d at 1509

(distinction between public speech and private speech "not a difficult concept"). In short, the constitutionally preferred remedy in this situation is "more speech"[5] with reasonable, viewpoint-neutral measures — not censorship.

B. Censoring Petitioners' Religious Viewpoint Suggests Governmental Hostility Toward Religion.

In *Mergens*, a plurality of the Court observed that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248.[6] Respondent's discrimination against the Good News Club presents just such a situation and communicates the same message — hostility toward religion. Even school-aged children cannot be expected to ignore this hostility and discrimination.

Indeed, the message of hostility toward religion is all the more troubling due to the age of the children involved. This Court has cited the impressionability of young children as supporting the need to safeguard against the appearance of governmental sponsorship of religious activity. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578,

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[5] *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[6] *Cf.* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785) ("the Bill violates equality by subjecting some to peculiar burdens"), *reprinted in Everson* v. *Board of Educ. of Ewing*, 330 U.S. 1, 66 (1947) (appendix to dissent of Rutledge, J.); *id.* ¶ 9 ("It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."), *reprinted in Everson*, 330 U.S. at 69 (appendix to dissent of Rutledge, J.).

584 (1987); *School Dist. of Grand Rapids* v. *Ball*, 473 U.S. 373, 385 (1985), *overruled*, *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997). When the government's message is one of hostility toward religion, however, impressionable children are equally harmed.

The Constitution "forbids hostility toward any" religion. *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984). By excluding the Good News Club from facilities available to the Boy Scouts, Girl Scouts, and 4-H Club, Milford demonstrated unconstitutional hostility toward religion. A message of hostility toward religion harms impressionable young children who may be led to believe that their government does not like religion or that their government thinks religion is bad for them. Such a message can be avoided through a policy of neutrality and even-handed treatment.

IV. PUBLIC OFFICIALS NEED CLEAR GUIDANCE AND WORKABLE RULES TO UPHOLD GOVERNMENTAL NEUTRALITY TOWARD RELIG-ION.

Public school officials and other governmental officers who oversee public facilities routinely handle requests from a variety of groups, including religious organizations, to use government facilities. These officials, most of whom are not lawyers, need clear channel markers if they are to navigate between the Free Speech Clause on one hand, and the Establishment Clause on the other.

In *Widmar*, *Lamb's Chapel*, and *Rosenberger*, this Court set out those markers, placing certain inquiries beyond the authority of governmental officers. In so doing, the Court clarified (and simplified) the duties of public officials faced with requests from religious

organizations to use public facilities. These officials were required to review the purposes for which their facilities could be used, determine if the religious organization wished to use the facility for one of those purposes, and *then treat the religious organization just like any other group*. The officials were not given the Sisyphean task of distinguishing between religious "speech" and religious "worship." *Widmar*, 454 U.S. at 269–70 & n.6, 272 n.11. They were *not* to evaluate the organization's materials to see if they were sufficiently secular. *Cf. Rosenberger*, 515 U.S. at 845–46. There was to be no endorsement of religion, but neither was there to be any discrimination against religion.

Hoping to promote better understanding of this Court's Establishment Clause jurisprudence, particularly in the context of religious activities in public schools, various organizations and governments have issued guidelines to assist public officials in understanding their obligations. For example, beginning in 1997, the Attorney General of Alabama issued *Guidelines for Religious Activities in Schools* to public school officials in Alabama. Recently revised after the decision in *Santa Fe Independent School District* v. *Doe*, these *Guidelines* address, *inter alia*, the use of public school facilities by private religious organizations. The Alabama *Guidelines* state:

> Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, *subject to the same limitations placed on non-religious meetings.*

App. A, *infra*, at 5a (emphasis added). With respect to private baccalaureate services, the *Guidelines* similarly provide:

> If a school by policy and practice rents out its facilities to private groups, it must rent them out *on the same terms and conditions*, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.

Id. at 6a (emphasis added). The Alabama *Guidelines* stress the requirement of governmental neutrality toward religion:

> Teachers and school administrators *must demonstrate and observe neutrality* with regard to private baccalaureate services and school officials *may neither encourage nor discourage* student attendance at such events.

Id. (emphasis added).

The Department of Education of the Commonwealth of Virginia issued *Guidelines Concerning Religious Activity in the Public Schools* in 1995. The Virginia *Guidelines* contain advice similar to the Alabama *Guidelines*:

> 60. Once the school district opens its facilities for use by students or community groups during non-school hours, the Free Speech clause of the First Amendment generally requires that the school district not discriminate based on the point of view of groups seeking equal access to those facilities. The denial of access to religious groups can constitute viewpoint discrimination in violation of the Free Speech Clause of the First Amendment.
>
> 61. Use of school facilities by religious community groups after school hours should be granted on the same basis as other nonreligious

> community groups. A group may not be denied use of meeting space solely because its speech, purpose or identity is religious.

App. B, *infra*, at 34a–35a (citations and footnotes omitted).

The United States Department of Education was among the first to issue such guidelines, entitled *Religious Expression in Public Schools*, and has distributed them to every public school in the nation. These federal guidelines contain similar advice regarding the use of public school facilities after hours by private religious groups:

> If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

App. C, *infra*, at 66a. The federal guidelines similarly underscore the importance of official neutrality in religious matters:

> *Official neutrality regarding religious activity*: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Id.

These guidelines evidence the substantial efforts public officials are making to explain and uphold this Court's Establishment Clause jurisprudence. In particular, public officials in State and Federal government are attempting to explain and promote governmental *neutrality* in the context of free speech and religious activities. Unfortunately, the decision of the Second Circuit undermines these efforts.

This Court has repeatedly "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger*, 515 U.S. 839 (citing *Lamb's Chapel*, 508 U.S. at 393–94; *Mergens*, 496 U.S. at 248, 252; *Widmar*, 454 U.S. at 274–75). The Court has similarly rejected the suggestion that public officials should exclude religious organizations simply because their mode of expressing their views and beliefs may take the form of singing religious songs, prayer, reading scripture, or proselytization. *See Widmar*, 454 U.S. at 269–70 n.6; *Rosenberger*, 515 U.S. at 844–45. A common theme throughout this line of cases, both in the Court's Free Speech Clause analysis and in its Establishment Clause analysis, has been governmental neutrality — neutrality toward varying viewpoints and neutrality toward varying religions and religious traditions.

Neutrality is a concept governmental officials can understand. It is a concept governmental lawyers can explain. Of course, that is not to say that applying the principle of neutrality is always easy given the innumerable factual situations governmental officials face every day. The appropriate course of governmental action is not always obvious, but a clear rule of neutrality goes a

long way toward pointing public officials in the right direction. In this case, the *amici* States urge the Court once again to underscore the principle of governmental neutrality that lies at the heart of its decisions in *Widmar*, *Lamb's Chapel*, and *Rosenberger*.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

[Seal]
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July 21, 2000

M E M O R A N D U M

TO: All City and County Superintendents of Education

FROM: Bill Pryor, Attorney General
Michael R. White, General Counsel, State Department of Education

RE: Updated Guidelines for Religious Activities in Schools

A joint memorandum to all superintendents regarding permissible religious activities in public school settings was sent to you on December 8, 1997. On April 13, 1998, you received Guidelines for Graduation Exercises and Baccalaureate Services. On July 29, 1999, after the decision by the United States Court of Appeals in *Chandler v. James*, we wrote a joint memorandum to update the Guidelines based upon the decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals. We now write again to update the Guidelines based upon the Supreme Court's recent

decision in the case of *Santa Fe Independent School District v. Doe*.

In *Santa Fe Independent School District v. Doe*, the Supreme Court ruled that a Texas school district could not organize a student election to select a student to give an invocation before high school football games. Our Guidelines already indicated that "[o]rganization or direction of a prayer by a school official would not be appropriate," so this new decision has not required a change to the Guidelines. We have merely added statements to explain that the prohibition on "organization or direction of a prayer" means school officials should not hold a student election for the purpose of selecting a student to give a prayer at school-sponsored sporting events. We advise that this same rule should apply to school-sponsored activities generally, including commencement/graduation exercises. This does not, however, prohibit regularly scheduled student speakers, such as a valedictorian or class president, from praying, reading scripture, or making religious comments in the course of their speeches. As the Eleventh Circuit Court of Appeals held in *Chandler v. James*, such "genuinely student-initiated religious speech" is protected by the First Amendment.

As you may remember from our July 29, 1999, Memorandum, the Permanent Injunction issued by Judge DeMent against the DeKalb County school system in the *Chandler v. James* case was vacated and remanded by the Eleventh Circuit Court of Appeals. The Court found that "genuinely student-initiated religious speech" may not be suppressed nor restrictions applied "on the time, place, and manner of that speech which exceed those placed on students' secular speech." The Supreme Court has vacated that decision and ordered the Eleventh Circuit to

reconsider the case in the light of its new decision in the *Santa Fe* case. We believe the Eleventh Circuit's decision is consistent with the outcome in *Santa Fe*, and that the Court's opinion will not be significantly modified. In any event, we will inform you as soon as the Eleventh Circuit rules.

As before, we believe these Guidelines should enable you to ensure that students can fully exercise their First Amendment rights in an environment that does not conflict with the Establishment Clause.

GUIDELINES FOR RELIGIOUS ACTIVITIES IN SCHOOLS

Introduction

The following guidelines are issued to provide assistance to public school administrators and teachers. These guidelines are based on the rules reiterated by the Eleventh Circuit Court of Appeals in *Chandler v. James* and in opinions of the United States Supreme Court. These guidelines are intended to be instructive and not all-inclusive.

Permissible Activities in General

- Students may voluntarily engage in individual or group prayer during non-instructional time or at school-sponsored events. This includes individual or group prayer before or after athletic events. School officials (e.g. coaches) should neither encourage nor discourage individual or group prayer. Organization or direction of a prayer by a school official would not be appropriate; this also means that school officials should not hold a student election for the purpose of choosing a student to give a prayer at a school-sponsored event.
- Students may voluntarily engage in religious discussions during non-instructional time or at school-sponsored events. Students may speak to and attempt to persuade their peers about religious topics just as they do with regard to political or other topics.
- Students may express religious beliefs in reports, homework, artwork, and other written and oral assignments, which should be judged by ordinary academic standards of substance and relevance.

- Private citizens (including students) may distribute religious literature in accordance with all applicable time, place and manner restrictions applicable to the distribution of literature that is unrelated to school curriculum activities.
- Students may display religious messages or symbols on items of clothing (e.g., cross, menorah, Star of David, etc.) to the extent that they may display comparable non-religious messages or symbols on items of clothing. Students also may wear particular attire (e.g., yarmulkes, head scarves, etc.) during the school day or at school-sponsored events as part of the students' religious practices consistent with board policies and State law.
- Private citizens and student groups must be allowed access to school facilities for meetings of a religious nature, subject to the same limitations placed on non-religious meetings.
- Students in secondary schools may have announcements of meetings of a religious nature conveyed in the same manner that announcements are made for meetings of other non-religious groups (e.g. public address system, school newspaper, etc.).
- Teachers may teach about religion, including the Bible and other scripture, provided that such teaching concerns the history of religion, comparative religions, the Bible (or other scripture) as literature, and/or the role of religion in the history of the United States. The use of religious symbols (e.g., cross, menorah, symbols of Native American religions) is permitted as a teaching aid or resource provided such symbols are displayed as an example of the cultural and religious subject being taught.

- A fixture or symbol that is traditionally associated with a particular religion (e.g., nativity scene, menorah, etc.) may be included as a "prop" in a school holiday production to the same degree that non-religious props are used in school productions, provided such symbols are displayed as an example of the cultural and religious heritage of the holiday.
- Traditional holiday music may be included in school productions (e.g., choral events, band activities, etc.) in keeping with the cultural or religious heritage of the holiday.

Special Considerations for Commencement/Graduation

Baccalaureate Services

- If a school by policy and practice rents out its facilities to private groups, it must rent them out on the same terms and conditions, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services.
- Teachers and school administrators must demonstrate and observe neutrality with regard to private baccalaureate services and school officials may neither encourage nor discourage student attendance at such events.
- Teachers and school administrators may attend such functions in their individual capacities.
- Baccalaureate services are to be announced or advertised in the same manner as other non-religious meetings, such as notices in the school newspaper or use of the public address system and bulletin boards.

Commencement Exercises

- Student-initiated religious speech is permitted; however, school officials are not to encourage, organize, or direct such speech. This also means that school officials should not hold a student election to choose a student to give a prayer at school-sponsored commencement exercises.
- Regularly scheduled student speakers (e.g., valedictorian, salutatorian, class president) may make religious comments during their speeches. School officials are not to encourage or direct such speech.
- Religious persons and/or organizations are entitled to advertise in school commencement programs/ directories on the same terms as other persons or community organizations.

The intent of these Guidelines is to outline a course of study, conduct, and related activities that does not prescribe directly or indirectly a single religion, belief, or observance and that is consistent with the prevailing decisions by the United States Supreme Court and the Eleventh Circuit Court of Appeals.

Any questions regarding the above Guidelines or conduct that is not specifically detailed above should be directed to the Office of the Attorney General, Bill Pryor, or the General Counsel for the Department of Education, Mike White.

APPENDIX B

[Seal]

Board of Education's Guidelines Concerning Religious Activity In The Public Schools

WHEREAS, the 1994 General Assembly enacted Va. Code § 22.1-280.3 requiring the Board of Education, in consultation with the Office of the Attorney General, to develop Guidelines on constitutional rights and restrictions relating to religious expression in our public schools; and

WHEREAS, such Guidelines are not intended to be regulations displacing local discretion and determination, but as technical assistance outlining relevant constitutional and statutory principles for consideration by local school authority; and

WHEREAS, in accordance with Va. Code § 22.1-280.3, the Board of Education provided broad-based opportunity for input from the general public, teachers and local school boards, before establishing Guidelines.

NOW, THEREFORE, BE IT RESOLVED that the Board of Education hereby adopts the attached Guidelines and directs that they be disseminated to the public schools of this Commonwealth and made available for public distribution.

Adopted this 22nd day of June, 1995.

s/ James P. Jones
James P. Jones
President, Board of Education

s/ William C. Bosher, Jr.
William C. Bosher, Jr.
Superintendent of Public Instruction

Board of Education's Guidelines Concerning Religious Activity In The Public Schools

Introduction

1. These Guidelines are not intended as regulations or state policies displacing local discretion. These Guidelines are designed instead as technical assistance for consideration by local school officials, administrators and teachers in formulating their local policies and decisions. They have been adopted following public hearings throughout the Commonwealth and after opportunity for comment and input from the general public, teachers, school administrators and school boards, parents and students, and interested organizations.

2. These Guidelines do not purport to provide definitive answers to all of the possible issues and the varied circumstances as may exist in the public schools. Indeed, the United States Supreme Court has cautioned that decisions in this area are particularly fact-sensitive. In that regard, local school consideration should also take into account the attached memorandum prepared by the Office of the Attorney General, dated January 9, 1995. That memorandum sets forth the conceptual framework in the law generally applicable and governing in most situations.

Guidelines

3. One can imagine a number of situations in which private individuals might engage in religious expression or practices. They might pray before school, during school, or during extracurricular activities; they might wear religious attire or clothing with a religious message. They might carry the Bible or other sacred texts with them in school; they might attempt to evangelize or

proselytize other students. The religious beliefs of some students may cause their parents to request that they be excused from holiday celebrations, holiday pageants, physical education or a curriculum which violate sincerely held religious convictions.

4. The public schools should thoughtfully consider any religious objection to its practices or policies made by parents or students. School authorities should determine whether exemptions or exceptions to their policies and practices can be provided in the interest of reasonably accommodating sincerely held religious beliefs.

Curriculum

5. Students should be excused from school to attend religious services or observe religious holidays. Manifestly, any requested absence must be in conformity with local school procedures, including parental or guardian approval as necessary.

6. The public schools are not required to conform their curriculum to every religious tenet or objection. On the other hand, while the curriculum must not be designed to promote religious belief or non-belief, it need not be sanitized of all religious references or themes which may appear in educational materials. While the precise contours of their rights have not been judicially defined, parents and students also have constitutional rights — at least in some circumstances — to exemption from assignments, materials or programs that substantially burden their religious tenets. Thus, public school authorities should thoughtfully consider whether suitable alternatives are available that would allow students to opt-out of any program in which participation would substantially burden their religious tenets. Where such a burden occurs and public school authorities cannot

show a compelling interest in requiring attendance, the student must be allowed to opt-out.[1]

7. As provided by state law, local school boards must excuse from school attendance "any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Virginia law provides however that "bona fide religious training or belief does not include essentially political, sociological or philosophical views or a merely personal moral code." *See* Va. Code § 22.1-257. Also, Virginia law authorizes home instruction as an alternative to public schooling under certain conditions. *See* Va. Code § 22.1-254.1. When the requirements of home instruction have been met, instruction of children

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[1] These rights of parents and students are granted in the Free Exercise and Free Speech Clauses of the First and Fourteenth Amendments. The Religious Freedom Restoration Act may also provide similar protection. Opt-out or excusal as an accommodation to free exercise concerns has been looked upon favorably by the courts. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1533 (9th Cir. 1985) (Despite finding of a [*sic*] free exercise burdens inherent in making child read textbooks which espoused views contrary to her family's faith, no constitutional violation as student was excused from reading offensive book and assigned an alternative book); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (parents of school children successfully challenged the mandatory use of textbooks which contained religiously objectionable references); *Mozett v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (requiring students to be simply exposed to objectionable ideas in standard curriculum did not impose substantial burden on religion without proof that the student was required to conform or take some action contrary to their religious belief); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (dismissing challenge to supplemental reading program which contained offensive references to "witches, giants and sorcerers" and arguably suggested pagan themes).

by their parents in their home is an acceptable form of education under the policy of the Commonwealth of Virginia.

8. School personnel, including teachers, shall not lead their classrooms in devotional exercises whether directly in class or over a public address system.[2] A school official or teacher also shall not ask or designate a student volunteer to lead the class in a devotional exercise.[3]

9. Our United States Supreme Court has however aptly recognized that public education may not be complete without a study of our religious heritage or an objective comparison of our religious pluralism. *School Dist. v. Schempp*, 374 U.S. 203 (1963). When presented objectively as part of a secular program of education, the public schools may offer courses in comparative religion, study the history of various religions and their relationship to civilization, as well as the historic and literary qualities of religious materials. Religious music may also be included in music classes, religious art may be included in art and humanities classes, the Bible and other religious texts may be studied in literature classes, and literature dealing with religious themes may be used in language arts development. School and classroom libraries may also include books with religious themes.[4]

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[2] *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

[3] *B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982).

[4] In *Roberts v. Madigan*, 702 F. Supp. 1505 (D. Colo. 1989), a federal court, in refusing to remove a Bible from a public school library stated: "In this age of enlightenment, it is inconceivable that the Bible should be excluded from a school library. The Bible is regarded by many to be a major work of literature, history, ethics, theology and philosophy. . . . To deprive a public school library's collection of the Bible would, in the language of Justice Robert Jackson, render the educational process 'eccentric' and incomplete." *Id.* at 1513.

If the school offers a course specifically studying the Bible or other religious texts as literature, the course should be taught like other courses offered at the same grade level. The material must be balanced and objectively taught without attempt to indoctrinate religious belief or non-belief. Teachers of the course should be assigned using objective standards without any religious test.[5] Discussion of religious topics or materials should be relevant to the curriculum and should not occupy a disproportionate amount of classwork. Course work should not include participation in a religious ceremony of any kind during or outside of class.[6] Schools should also be mindful of their students' diversity of religious beliefs.

10. Religious symbols or religious texts, such as the Ten Commandments, may not be posted in the public schools when the purpose or primary effect is to advance religion, but may be posted on a temporary basis as part of an academic lesson or curriculum. The public schools, however, may properly teach students important values, ethics and morality, but not through religious indoctrination. The Ten Commandments, the Bible, as well as other religious materials may be studied for bona fide educational purposes.

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[5] *Crockert v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983); *Vaughn v. Reed*, 313 F. Supp. 431 (W.D. Va. 1970).

[6] *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979), finding that student participation in transcendental meditation ("TM") exercise constituted an establishment or religion in violation of the First Amendment.

Free Time

11. During most of the school day, the attention of students is properly directed toward activities forming part of the school curriculum or co-curriculum. There are, however, other periods of the school day when students are generally free to read on their own, or to gather together and/or talk among themselves about subjects of their own choosing. While such non-instructional periods may vary from school to school, they typically include, but are not necessarily limited to (i) riding to and from the school on the school bus, (ii) a period each morning between the time students are permitted on school grounds and the time they are required to be present in their seats, (iii) lunch time, (iv) recess in the lower grades, and (v) in the upper grades, brief periods between classes.

12. During such free time, students should be free to read religious literature of their own choosing, and to discuss religious themes with other willing students on the same basis as they might discuss secular interests and subjects.

13. Student-initiated and non-disruptive devotional activities during free time, such as "meet me at the pole" events prior to school, should be permitted. Teachers and school officials must not encourage or discourage participation by students in such events. The public schools however have the right and responsibility to protect public property and preserve order and determine the school facilities and permissible locations authorized for such activity. Such decisions should be made and applied evenly without favoring or discriminating against the activity solely because of its religious nature.

14. Similarly, if a school conducts a study period or provides other times in which students are allowed to

read materials other than those prescribed by the school curriculum, the students must be free to read religious material, not just secular material.

Student Dress

15. Students will sometimes express their religious convictions on their clothing or personal effects. For example, a Christian girl may wear a necklace bearing a cross, while a Jewish girl may wear a necklace displaying a Star of David. Students may also wear T-shirts bearing religious messages.

16. In the absence of disruption to school activities, obscenity or lewdness, these and other expressions of belief will generally constitute protected speech. Public school personnel may not discipline students because they disagree with the underlying message, but may take reasonable action needed to promote order and address any disruptive *effects* of such student speech. A school may adopt a content-neutral dress code that uniformly prohibits certain kinds of clothing altogether; provided, a dress code does not single out or discriminate against religious expression. For example, schools may determine that T-shirts are not appropriate attire and apply the policy evenhandedly to all such apparel. Schools should attempt, however, to accommodate student's religious attire as well as religiously based modesty concerns (*e.g.* in physical education classes).

Student Assignments

17. Student art projects often center around seasonal themes. Where the season has both secular and religious connotations, some students may prefer to depict a secular aspect of the season, while others may prefer to depict a religious aspect.

18. So long as the expression is germane to the assignment, teachers should not discriminate against students who prefer a religious theme or viewpoint over a secular one (or vice versa). Example: Where different students depict a manger scene, a menorah and "Frosty the Snowman," the teacher may display them all on an equal basis, or on the basis of their artistic merit, but may not discriminate in favor or against any of them on the basis of the religiosity or secularity of their themes. Students have a right to express their religious values and viewpoints in their classwork, assignments and work products to the same degree that students may express secular viewpoints. A student's grade or evaluation must never be affected by his or her creed or religious belief or non-belief.

Distributions of Religious Literature

19. Students should be permitted to distribute religious material during school on the same or equal basis as non-religious material. *Rivera v. East Otero Sch. Dist.*, 721 F. Supp. 1189 (Colo. 1989) (peaceful student distributions of religious literature at school protected by the First Amendment). The schools may however reasonably regulate the time, place and manner of such distribution. *Hedges v. Wauconda Comm. Sch. Dist.*, 9 F.3d 1295 (7th Cir. 1993). (Merely permitting an eighth grader to distribute religious literature to peers before class without disruption did not raise Establishment Clause concerns).

20. Schools should not grant community groups or individuals from outside the school special access to the students during the school day for purposes of proselytizing or distributing proselytizing literature to students. *See, e.g., Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir.), *cert. denied*, 113 S. Ct. 2344, 124

L. Ed. 2d 254 (1993). A long line of Supreme Court precedents establish that it is impermissible for school officials to allow the machinery of the state to be used to provide an audience for religious exercises or instruction by outside groups. *See Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962). In disapproving access to students by religious organizations, the Court, in *McCollum*, stated that:

> Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery.

333 U.S. at 212.

21. Community groups have no right to enter the school grounds to distribute materials to students during the school day. Where the school elects to allow such distribution by some community groups for nonsectarian purposes, the law is still developing with regard to affording equal access to community groups to distribute religious materials in the public schools. Policy in this area should consider the manner, time and location of the distribution and whether there is risk that impressionable children will perceive official school endorsement of the material.[7]

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[7] *See Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994), *petition for cert. filed*, No. 94-1299, 63 USLW 3583 (January 26, 1995) (school district engaged in viewpoint discrimination by denying access to a religious community group

Holidays

22. Public Schools have traditionally acknowledged a wide variety of holidays, some with religious origins and significance. Teachers and students typically prepare displays, study the origin of holidays and participate in plays or concerts. Administrators and teachers should fundamentally be sensitive to "inclusion" not "exclusion" of students holding diverse religious viewpoints.

23. A public school may recognize holidays also having religious significance to some (e.g., Christmas and Easter). While these holidays have religious origins and retain a religious significance, they have also become part of our national culture and heritage. The religious significance should not, however, be promoted or sponsored. Case law suggests that context can be important to assure fair balance and sensitivity to all students. A musical program consisting solely of religious music, for example, is more problematic than a program that combines religious and secular music. *See R.J.J. v. Shineman*, 658 S.W.2d 910, 913 (Mo. Ct. App. 1983) (winter holiday concert constitutional where seasonal numbers such as "Jingle Bells" performed along with Christmas carols). *See also County of Allegheny v. ACLU*,

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meeting with students after school, while permitting an allegedly nonreligious community group to meet with students on the same topics); *Sherman v. Community Consol. Sch. Dist.* 21, 8 F.3d 1160 (7th Cir. 1993) (no establishment clause violation when school division allowed the Boy Scouts, which requires all members to affirm belief in God, to use elementary school facilities for meetings and to distribute flyers and posters through the school); *Schanou v. Lancaster County Sch. Dist.*, 863 F. Supp. 1048 (D. Neb. 1994) (Gideons permitted to distribute Bibles after school to students on sidewalks on school property where other groups also allowed to distribute their literature).

492 U.S. 573 (1989) (display of menorah next to Christmas tree acceptable whereas display of creche alone unacceptable); *Lynch v. Donnelly*, 465 U.S. 668, at 680 (1984) (context of creche display critical). Moreover, public school personnel should be animated by secular motives or goals — not by a desire to subtly indoctrinate.

24. A school may also teach its students objectively about religious holidays, including their religious significance, without offending the Establishment Clause when presented as part of a secular education program. *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980). In *Florey*, the court upheld a school's holiday policy, noting that it is constitutionally permissible for a school to "advance the students' knowledge and appreciation of the role that our religious heritage has played in the social, cultural and historical development of civilization." *Id.* at 1314 (quoting policy). *See also Clever v. Cherry Hill Township Bd. of Educ.*, 838 F. Supp. 929 (D.N.J. 1993) which considered the constitutionality of a school board's policy regarding "the use of cultural, ethnic, or religious themes in our educational program." *Id.* at 932. The court upheld the policy for a variety of reasons, observing that "the use of appropriate classroom and central displays is clearly a recognized and legitimate educational technique." *Id.* at 939.

25. Any student should always be permitted to opt out of holiday-related events and programs because of strongly held religious sentiments.

26. Devotional or strictly religious exercises must be avoided.

27. Whenever feasible, schools should strive to avoid scheduling exams and special events on days when it is

foreseeable that some students will be absent to celebrate religious holidays. Similarly, if a school gives awards for perfect attendance, it should not withhold such recognition from students whose only absence is necessitated by holidays where observance is prescribed by the student's faith.

The Equal Access Act

(The Equal Access Act) means that the school will have the same regulations for a religious club as for any other club, no more, no less.
Senator Mark Hatfield

28. School officials should be familiar with the federal Equal Access Act (20 U.S.C.S. §4071, *et seq.*). The Act guarantees, under certain circumstances, student religious and Bible study groups equal access and opportunity to conduct meetings in the secondary public schools on the same basis as other noncurriculum related student groups. *See* Attorney General's attached memorandum. Congress' primary purpose in passing the Act, according to the Supreme Court, was to end "perceived widespread discrimination against religious speech in public schools." *Mergens*, 496 U.S. 226, 239 (1990). While Congress recognized the constitutional prohibition on governmental promotion of religion, it also believed that nonschool-sponsored student speech, including religious speech, should not be excised from the school environment.

29. There are three basic Guidelines under the Equal Access Act:

30. The first is *nondiscrimination*. If a public secondary school permits student groups to meet for student-initiated activities not directly related to the school curriculum (such as chess club, ski club, scuba

club, etc.), it is required to provide equal access on the same basis to religious groups. The school cannot discriminate against any students conducting such meetings on the basis of the religious, political, philosophical, or other content of the speech at such meetings. Religious speech and expression are to receive equal treatment.

31. The second basic concept is protection of student-initiated and student-led meetings. Student-initiated means that the students themselves, without influence or promotion by school personnel, seek to meet and that the students will direct and control the religious discussion without governmental participation.

32. The third basic concept is *local control*. The public schools may apply content-neutral disciplinary rules to avoid disruption, or reasonably regulate the time, place and manner of such meetings. For instance, a school may establish a reasonable time period for meetings on any one school day, a combination of days or all school days. It may assign rooms, and enforce student discipline codes.

33. To comply with constitutional and statutory law, the public schools must allow religious student groups equal access to meeting room facilities and other locations at school as made available to noncurriculum student groups. Similarly, religious student groups should have equal access to facilities made available to noncurriculum student groups to announce their meetings. These may include, for example, the student newspaper, bulletin boards, the public address system and club fairs. Where a religious group is the first noncurriculum group to apply for such access, the school may allow such group access provided that it adopts a policy that would also allow non-religious noncurriculum groups equal access. The right of a lawful, orderly student group to meet, however, cannot

depend on the approval of other students and cannot be denied because other students object to their access. A student group should not be denied equal access merely because its views are unpopular.

34. Public school authority may also not retaliate against any student or teacher because of his or her association with a religious organization.

Teacher Expression of Religion

35. As public employees, and agents of the public schools, the speech rights of teachers are not absolute and must be balanced against the school's legitimate right and duty to maintain order, perform its obligations to the population served, and avoid government sponsorship of religion. Teachers must be cognizant of their great influence in shaping student values and their overarching duty not to use their position to indoctrinate students into their religious beliefs or lack thereof.

36. As a general matter, neither the Free Exercise nor Free Speech clauses provide teachers an unqualified right to engage in religious expression with students at school. Because teachers play a central role in setting values for our children, they must also bear responsibility for their actions which impermissibly create a danger of establishing religion in the public schools, including misapprehension by pupils that the public schools sponsor the teacher's viewpoint. Teachers should not lead students in devotional activities during class or school-sponsored activity, or encourage students to participate with the teacher in religious activity before or after school. A teacher who wishes to participate in voluntary student, religious activity during free time should be careful that his or her participation is not misinterpreted by students as official sponsorship of religious belief. The

circumstances of each case, including the maturity of the students and the context and duration of the event must be professionally considered.

37. A teacher may respond honestly, in a noncoercive, and nonindoctrinating manner, to student-initiated inquiries about religion, just as a teacher may respond in an appropriate manner to student inquiries about political, philosophical or other secular interests. Balance, degree and fairness are important considerations, and the specific question may best be answered by referring the student to his parents.

38. Teachers should be able to meet with other teachers for private religious speech, including prayer, meditation and reading of religious materials, during their free time, such as immediately before or after class or during breaks or lunch. As professionals, teachers need to be careful however that their actions are not misinterpreted by students.

Moments of Silence

39. The Code of Virginia (§ 22.1-203) authorizes the school board of each school division to establish the daily observance of one minute of silence in each classroom of the division. In establishing policy, the school board must be careful that its policy is animated by secular justifications, not merely as a pretense to encourage prayer.[8] Public schools may provide students, for

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[8] *Cf. Wallace v. Jaffree*, 472 U.S. 38 (1985); *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985). In *Jaffree*, Alabama's moment of silence statute was invalidated by the U.S. Supreme Court, partly because legislative record evidenced primarily religious, rather than secular purpose. Virginia's statute can be defended as promoting lawful goals, and not simply to endorse religion. Care must be taken that it is administered neutrally.

example, with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. A brief minute of silence may also fulfill other secular objectives, including maintenance of discipline.

40. The teacher must ensure that all pupils remain seated and silent and make no distracting display to the end that each pupil in the exercise of his or her individual choice and consistent with freedom of conscience, may engage in any silent activity (including prayer) which does not interfere with, distract, or impede other pupils in the like exercise of individual choice. The teacher may say the following, for example, before stipulating a minute of silence: "We will now observe a minute of silence. You may, in the exercise of your individual choice, meditate, pray or engage in any other silent activity which does not interfere with, distract or impede other pupils. You must remain seated and silent."[9]

41. The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. The teacher should also not use the time to pray aloud in front of other students, nor permit any other student, or group of students to pray aloud.

Graduation Prayer

School Initiated Prayer, Class Initiated Prayer

42. It is firmly settled in the law that the Establishment Clause forbids school-sponsored prayer or religious indoctrination, as well as any school initiative designed to endorse prayer generally or sponsor a

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[9] This language is drawn from § 22.1-203 of the Code of Virginia.

particular religious viewpoint. In 1992, the United States Supreme Court held in *Lee v. Weisman*, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), that school sponsored prayer, even nonsectarian and nonproselytizing prayer, at graduation ceremonies violated the Establishment Clause.

43. In *Weisman*, the participation and involvement of school personnel was pervasive in deciding whether there would be a religious invocation, selecting the speaker and even dictating the contents of the invocation through a pamphlet setting forth guidelines for "nonsectarian" prayer. In deciding that such pervasive involvement by school personnel was unconstitutional, a divided Court (5-4) remarked:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory.

112 S. Ct. at 3655, 120 L. Ed. 2d at 480.

44. The Court was concerned not only with the pervasive degree of school participation in religious matters, but also with the resulting subtle coercive pressures that accompany any official religious observance as part of a school-sponsored event. The argument that the ceremony was "voluntary" was rejected by the majority over the objections of the dissenting Justices. Even though objecting students were not required to attend graduation to receive their diplomas,

such attendance was "in a fair and real sense obligatory." *Id.* at 2655, 120 L. Ed. 2d at 480. As the Court observed:

> Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions ... Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the word "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id. at 2659, 120 L. Ed. 2d at 486.

45. Nothing in *Weisman* would prohibit students from themselves organizing a privately sponsored baccalaureate service before or following the graduation ceremony off the school grounds. *See* 112 S. Ct. at 2677, 120 L. Ed. 2d at 508.

46. Devotional exercises at school sponsored events do not become constitutional simply by excusing objecting students from attendance.

47. The decision in *Weisman* has produced a split in the lower courts over the constitutionality of class-initiated, student led prayer at graduation ceremonies. This issue will necessarily be uncertain in the law until resolved by the United State Supreme Court. For example, a federal appeals court in Texas approved a school board's policy allowing graduation prayer where a majority of the graduating class voted for "neutral" prayer by a student volunteer. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F. 2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950, 124 L. Ed. 2d 697 (1993). In *Jones*, unlike *Weisman*, school personnel neither made the decision to

include a religious invocation or to supervise the delivery and preparation. They merely abided by the collective decision of the senior class, as expressed through a vote. The Fifth Circuit reasoned that the Establishment Clause is a restraint on government and not when prayer is "the result of student, not government choice." *Id.* at 968. Other lower courts have used reasoning similar to the Fifth Circuit's.[10] However, there is also a substantial body of case authority to the contrary, including a decision by the Ninth Circuit that rejected the rationale in *Jones* and reached the opposite result, holding that when school officials "delegate" a decision on prayer to a vote of the senior class, the resulting election in favor of prayer is still state-action. *Harris v. Joint Sch. Dist. No. 241*, 41 F. 3d 447 (9th Cir. Nov. 18, 1994). A similar result was reached by a federal district court enjoining the Loudoun County public schools from permitting student led and initiated prayer at graduation ceremonies. *See Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993) (declaring that organized prayer at a high school graduation is inherently divisive and unconstitutional no matter who inspires and delivers

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[10] *Stein v. Plainwell Community Schs.*, 822 F.2d 1406 (6th Cir. 1987) (validating nonsectarian student led and initiated invocation); *Adler v. Duvall Co. Sch. Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994) *argued orally*, #94-2638 (11th Cir., March 7, 1995); *Albright v. Board of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991) (finding that religious invocation was ceremonial in nature without evidence of coercion); and *Grossberg v. Deuschio*, 380 F. Supp. 285 (E.D. Va. 1974) (holding that brief nonsectarian prayer did not substantially burden religious liberty).

the invocation).[11] Only the Loudoun County public schools are bound by *Gearon*.[12]

48. The Supreme Court has not decided a case presenting the specific question whether religious invocations may be permitted when they result solely

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[11] *See also ACLU v. Blackhorse Pike Regional Bd. of Educ.*, No. 93-5368 (3d Cir. June 25, 1993) (unpublished opinion); *Friedmann v. Sheldon Community Sch. Dist.*, No. 93-4052 (N.D. Iowa May 28, 1993), *reversed on standing grounds*, 995 F.2d 802 (8th Cir. 1993). The reasoning in these cases follows decisions in other analogous contexts. In *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981), the Ninth Circuit Court of Appeals held that student-initiated and led prayer at school assemblies was unconstitutional; in *B. v. Treen*, 635 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), the Court held that student volunteers could not lead classmates in prayer even though objecting students could be excused; and in *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993), the Court invalidated the practice of offering prayers before a high school basketball game. In *Doe*, the Fifth Circuit stated that *Weisman* "is merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or-initiated religious expression or indoctrination." *Id.* at 165.

[12] Injunctive orders bind only the litigating parties, their agents and privies. *See* Fed. R. Civ. P. 65(d). While other Federal judges in Virginia would undoubtedly consider *Gearon* before ruling in a similar case, they are free to reach a different result. The principle that a decision by one federal district judge does not bind other judges — even in the same district — is amply demonstrated by a comparison of *Vaughn v. Reed*, 313 F. Supp. 431 (W.D. Va. 1970), and *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983). Judge Dalton held in *Vaughn* that an objectively-taught, mandatory, religious education program in public school would be consistent with the First Amendment. Judge Kiser, in refusing to follow the opinion of Judge Dalton, found Judge Dalton's opinion unpersuasive on that point and held that such programs must be optional. *Crockett*, 568 F. Supp. at 1431.

from a decision by the senior class through some electoral mechanism.[13] School divisions considering such policy should review existing case authority with legal counsel. Consideration includes: (1) the degree of governmental participation and oversight locally desired, (2) whether the activity results in any coercive pressure from teachers or peers on objecting students to participate at the expense of forfeiting benefits, (3) whether the activity is animated primarily by secular purposes,[14] and (4) whether the circumstances will suggest appearances of a school imprimatur, such as, for example, promotional statements in official publications or announcements. The test may very well be whether the activity, in practical effect, creates an impermissible appearance to a reasonable person that the public schools are supporting a religious perspective or viewpoint. Even in *Jones*, the court hastened to acknowledge that "we understand government to unconstitutionally endorse religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices." *Jones*, 977 F.2d at 968.

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[13] The recent *Harris* case may furnish the Supreme Court an opportunity to resolve this issue. At the time of the adoption of the Guidelines, a petition for a Writ of Certiorari is pending.

[14] There is case authority concluding that any governmental promotion of prayer during school-sponsored event [*sic*] is necessarily motivated by impermissible religious reasons. There is also authority to the contrary where the evidence is credible proving secular motives. For example, in *Adler* the Court was persuaded on the evidence of legitimate secular motives; namely, a desire to solemnize or set a serious note for the ceremony and to respect the choices and freedom of speech of students.

Individually Initiated Prayer by a Student Speaker

49. It is often the case that one or more students from the Senior Class are selected to speak at graduation, such as the Senior Class President, Valedictorian and Salutatorian. (While discussed in terms of a high school graduation, these same considerations would apply to a graduation or promotional ceremony from middle school.) Depending on local practice, the Senior Class may also elect one or more students to speak. Unlike the case of organizing and permitting collective prayer at graduation, school personnel may not censor a student who voluntarily chooses, on his or her own initiative, to include religious themes or references, including prayer, in a graduation address. If a student speaker elects on his own to use a portion of his allotted time delivering a prayer, or otherwise reflecting on the event of graduation from a religious perspective, it is not a violation of the Establishment Clause for the school to permit him to do so. Indeed, for the school to prohibit the speaker from doing so could violate his or her rights under the First Amendment.[15]

50. If the student speakers are selected by school officials (rather than by students), they should be selected on wholly secular criteria (e.g., class officers, class rank or other achievement), not based on what school officials

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[15] While these conclusions seem plainly mandated by well-established constitutional principles, at least one federal district court appears to have reached the opposite result. *See Gearon*, 844 F. Supp. at 1100, wherein Judge J. Bryan banned all graduation prayers in the Loudoun County public schools. Due to financial constraints the local school board did not appeal this case. Therefore, *Gearon* is binding on the Loudoun County public schools.

perceive as the likelihood that the speakers chosen would (or would not) pray.

51. School officials should neither encourage nor discourage them [*sic*] students from including a religious reference or offering prayer. For the problems associated with school and class decisions about whether to have prayer, see previous section.

52. If a student speaker advises school officials of his or her intention to offer a prayer or include a religious reference, school officials may not prohibit the speaker from doing so; but, neither should they print up in their official graduation program that a prayer or religious reference is expected or will occur.

53. School officials are probably entitled to review a student speaker's prepared remarks to insure that they are germane to the event of graduation. If no prayer or religious reference is found, the school officials should not ask the speaker to include one; if one is found, school officials should not require the speaker to excise it.

Baccalaureates

54. The United States Supreme Court has never explicitly ruled on the constitutionality of a baccalaureate, but the same constitutional considerations discussed in these Guidelines apply. At least two lower federal courts have found baccalaureate services involving minimal involvement of school officials to be constitutional.[16]

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[16] *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991), found constitutional a baccalaureate service in the high school auditorium which had been designated "public forum," and where there was no evidence that

55. The public school itself may not sponsor or arrange private baccalaureates. Such religious services may always be arranged by students, parents and community groups off the school premises. If any group seeks to conduct a baccalaureate *on* premises and after hours, they can be granted use of school facilities on the same basis as may be afforded other student or community groups. The administration of the event must, however, be careful to avoid circumstances reasonably suggesting sponsorship by the public schools.

56. In order to accommodate students who may be interested in hearing about a baccalaureate service, the school may permit scheduling notices to be included on bulletin boards and over public address systems on the same basis as other scheduling notices; but care should be taken to make sure that there is no appearance of school sponsorship or official encouragement of participation. The use of disclaimers is recommended. Teachers and school administrators who choose to attend should not suggest or encourage their students to attend.

57. Teachers and school administrators may attend the baccalaureate in their capacity as private citizens, but should not plan, direct, control or supervise the ceremony.

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school authorities created appearances of school sponsorship. In *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991), a district court upheld a school's decision to lease its auditorium to a nondenominational group for a baccalaureate service. Under the *Lemon* test, the Court found that the open access policy furthered a secular purpose; 2) the school's disclaimers disassociated it sufficiently so as not to advance religion; and 3) administrative oversight of the event did not foster excessive entanglement with religion.

Release Time Programs

58. Release time programs that permit students to attend religious instruction off the school premises have been constitutionally upheld as accommodations of the spiritual needs of our people. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). (Such programs "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs.") The mere release of students during school hours to attend religious courses is not *per se* unconstitutional. The administration of the program must be carefully managed to avoid excessive entanglement with religion. *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981) (registration and record keeping of students permissible). However, the public schools should not arrange, sponsor or pay for such programs, nor seek to influence or pressure students to participate in such programs. Moreover, in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), the Supreme Court held that it was unconstitutional for a public school to permit voluntary religious instruction *on school premises* during release-time periods. School authority should not supervise the off-campus religious instruction. Agents of the religious institution should not be permitted at school during school time to recruit students to participate in their religious exercises. Public school teachers should also not recruit students for the religious instruction program. In order to avoid excessive entanglement with religion, as a general rule no academic credit should be conferred for religious instruction. *But see Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981).

59. The logistics of a constitutional release time program require careful planning, knowledge of the case law in this area and attention to detail. School boards who wish to release students to attend off-school

programs may do so but should consult with their local counsel regarding registration, class location, attendance policies and class scheduling. *See, for example, Doe v. Shenandoah County Sch. Bd.*, 737 F. Supp. 913, 917, (W.D. Va. 1990); *Smith v. Smith*, 523 F.2d 121, 122 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

Equal Access By Community Groups

60. Once the school district opens its facilities for use by students or community groups during non-school hours, the Free Speech clause of the First Amendment generally requires that the school district not discriminate based on the point of view of groups seeking equal access to those facilities. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The denial of access to religious groups can constitute viewpoint discrimination in violation of the Free Speech clause of the First Amendment. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

61. Use of school facilities by religious community groups after school hours should be granted on the same basis as other nonreligious community groups.[17] A group

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[17] *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), *cert. denied*, 114 S. Ct. 2166, 128 L. Ed. 2d 888 (1994). *Good News Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994) (parent-led religious group has right to meet immediately after school at junior high school when Boy Scout programs are permitted to meet); *Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ. of Sch. Dist.*, 769 F. Supp. 1346 (W.D. Pa. 1991).

may not be denied use of meeting space solely because its speech, purpose or identity is religious.[18]

62. School districts may not charge religious groups a higher rental fee than nonreligious groups.[19] No rental fee may be charged religious groups if none is charged nonreligious groups.

Conclusion

63. Necessarily, all of the foregoing still requires thoughtful consideration of the pertinent circumstances. The United States Supreme Court has invariably emphasized "the importance of detailed analysis of the facts." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 226 (1948). And, while the judicial tests may vary depending upon the particular context, public school authorities should be familiar with the general concerns of the law and the dangers sought to be avoided. It is therefore important that the attached memorandum from the Office of the Attorney General be considered. It is fundamentally important that school authorities understand their constitutional duties to reasonably accommodate the religious heritage and pluralism of our people, to avoid an establishment of religion and, at the same time, not to adopt the impermissible view that any

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[18] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

[19] *Fairfax Covenant Church v. Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir.), *cert denied*, 114 S. Ct. 2166, 128 L. Ed. 2d 888 (1994).

and all religious expression must be banished from the public school.

MEMORANDUM

TO: ALL CONCERNED

FROM: THE OFFICE OF THE ATTORNEY GENERAL

DATE: January 9, 1995

RE: ***Memorandum of Legal Principles Animating Guidelines***

These Guidelines and accompanying memorandum are not intended as regulatory displacements of local discretion, but rather as guidance to school administrators, teachers, parents and students on the relevant constitutional and statutory principles and considerations.[1]

These Guidelines and accompanying memorandum also do not purport to provide definitive answers to all of the possible issues and varied fact scenarios as may exist in our public schools. Indeed, the United States Supreme Court has invariably cautioned that decisions in this area of law are keenly fact-sensitive.

Our public school officials, administrators and teachers must, however, have a working knowledge of the laws and principles. In so doing, government responsibly promotes the cherished freedoms underlying both our federal and state constitutions. And, in so doing, lawful decision-making is promoted, minimizing public school

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[1]This memorandum, which explains the salient legal principles governing religious expression in public schools, should be reviewed and considered by local school authorities and their counsel as background material integral to an informed understanding of specific applications in cases contained in the Guidelines.

resources being diverted to litigation defense. Such contests are not simply interesting debates on principle. Violations of protected rights may result in substantial damage awards and prevailing plaintiffs are entitled, under federal law, to reimbursement of their reasonable attorney fees. *See* 42 U.S.C. § 1988.

I. Controlling Constitutional and Statutory Provisions

A. United States Constitution

The First Amendment to the United States Constitution provides, in pertinent part, that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble ..."

The foregoing embodies fundamental restraints on the power of government. Under the 14th Amendment, these restraints apply not only to the "laws of Congress," but also to the policies, practices and decisions of state and local government, including public school officials, administrators and teachers entrusted with our public school system. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Engel v. Vitale*, 370 U.S. 421 (1962).

B. Constitution of Virginia (1971)

The Commonwealth of Virginia, through its own constitution, also guarantees the free exercise of religion and a corresponding prohibition on state and local government from becoming entangled in religious affairs:

> **Art. I, § 16. Free exercise of religion; no establishment of religion.** — That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by

> reason and conviction, not by force or violence; and, therefore, *all men are equally entitled to the free exercise of religion .... No man shall be compelled to frequent or support any religious worship,* place, or ministry whatsoever ... *nor shall otherwise suffer on account of his religious opinions or belief;* but all men shall be free to profess and by argument to maintain their opinions in matters of religion .... And the General Assembly shall not prescribe any religious test whatever, *or confer any peculiar privileges or advantages on any sect or denomination,* or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry[2], but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please. (Emphasis added.)

C. Federal Statutory Provisions

The United States Congress has enacted two pertinent federal statutes: the Equal Access Act and the Religious Freedom Restoration Act.

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[2]Virginia's Constitution prohibits appropriations of public funds to religious organizations and sectarian schools. *See* Va. Const. art. IV, § 16 and art. VIII, § 10, and *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955); *Miller v. Ayres*, 213 Va. 251, 191 S.E.2d 261 (1972); *Phan v. Virginia*, 806 F.2d 516 (4th Cir. 1986).

1. Equal Access Act, 20 U.S.C.S. § 4071, *et seq.*

The Equal Access Act basically guarantees student religious and Bible study groups equal access and opportunity to conduct meetings in the public secondary schools on the same basis as any noncurriculum-related student group.[3] The key text of the statute provides:

> (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
> (b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.
> (c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that:
> (1) the meeting is voluntary and student-initiated;
> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

[3]Congress has not defined "noncurriculum-related" student group. The United State Supreme Court has indicated that the term encompasses student groups meeting for purposes not directly related to the official curriculum; such as political clubs, chess and stamp clubs, as opposed to a French club for example. *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990).

> (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
> (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
> (5) nonschool persons may not direct, conduct, control, or regularly attend activities or student groups.[4]

2. Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb-1.

The Religious Freedom Restoration Act ("RFRA") basically prohibits government, including the public schools, from substantially burdening religion.[5] An

[4]Congress has further provided in subsection (D) that:

> Nothing in this title [20 USCS §§ 4071 et seq.] shall be construed to authorize the United States or any State or political subdivision thereof —
> (1) to influence the form or content of any prayer or other religious activity;
> (2) to require any person to participate in prayer or any other religious activity;
> (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
> (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
> (5) to sanction meetings that are otherwise unlawful;
> (6) to limit the rights of groups of students which are not of a specified numerical size; or
> (7) to abridge the constitutional rights of any person. . . .

[5]While any discussion of religious expression in the public schools would be incomplete without mention of this Act, it should also be noted that the Act represents an attempt by Congress to correct what

important exception is provided where "compelling" governmental interests are at stake and a "least restrictive" means is employed to further those ends. In more common parlance, public school authority must be prepared to show that its substantial burdens on religious liberty are justified by very important goals *and* that the means chosen is "least restrictive," that is, there being no less-intrusive alternative which would achieve or safeguard the governmental purposes at stake. In pertinent part, the Religious Freedom Restoration Act provides:

> (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest. . . .

42 U.S.C.S. § 2000bb-1.

D. Virginia Statutory Provisions. Virginia's General Assembly has also enacted the following:

(1) § 22.1-203. Daily observance of one minute of silence. — In order that the right of every pupil to

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it perceives as an ill-advised constitutional interpretation by the United States Supreme Court. While this Act may be subject to challenge on grounds that it violates the separation of powers doctrine, no court has ruled on the issue so far.

> the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.
>
> Where such one-minute period of silence is instituted, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

(2) § 22.1-203.1. Student-initiated prayer. — In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil not be subject to pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, consistent with constitutional principles of freedom of religion and separation of church and state, students in the public schools may voluntarily engage in student-initiated prayer.

Va. Code § 22.1-203.1 does not legislate an exception to the First Amendment of the United States Constitution. It also reminds us that the public schools

must serve students of many faiths on an equal basis without pressure:

> [T]hat the freedom of each individual pupil not be subject to pressure from the Commonwealth, either to engage in, or to refrain from, religious observation on school grounds . . . .

Va. Code § 22.1-203.

Because of its influence in shaping values, public school authorities must be sensitive to the great variety of beliefs and non-beliefs among its pupils. Aligning the prestige, authority or resources of the public schools in support of a particular religious perspective or statement can be as polarizing and debilitating as directly interfering with religious liberty. This concern is heightened in matters of prayer. Such expressions are deeply personal and, notwithstanding the best of intentions, government may neither inhibit prayer nor sponsor prayer in the public schools. Even appearances of such sponsorship can be polarizing and confusing, and spark a constitutional challenge to perceived favoritism by public school authority. Application of the statute therefore requires basic understanding of the relevant considerations animating our First Amendment:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.

County of Allegheny v. ACLU, 492 U.S. 573, 593-594.

3. Compulsory School Attendance Statutes

State law provides for home instruction under certain conditions (§ 22.1-254.1) and further excuses children from the compulsory school attendance laws on religious grounds. School boards are expressly required to "excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school." Va. Code § 22.1-257(A)(2). A bona fide religious training or belief however "does not include essentially political, sociological, or philosophical views or merely a personal moral code." *See* § 22.1-257(D) and *Johnson v. Prince William County Sch. Bd.*, 241 Va. 383, 404 S.E.2d 209 (1991) (upholding school board determination that objections to compulsory attendance were essentially philosophical and not religious).

II. The Conceptual Framework In The Law

The foregoing guarantees and restrictions require government, including public school officials, administrators and teachers, to steer a "neutral course" in matters of religion. *Zorach v. Clauson*, 343 U.S. 306 (1952). This generally means that the public schools may not use their personnel, influence or resources to advance or inhibit religion. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

It is also important to keep in mind that the Constitution also forbids the public school from discriminating among religions, as well as promoting religion generally.[6] *Everson v. Board of Educ.*, 330 U.S. 1

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[6]Although not directly addressed by any case decision, it would also appear to be unconstitutional for a school to promote atheism or agnosticism.

(1947) and *Board of Education v. Grumet*, __ U.S. __, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994).

The required "neutrality" can be particularly daunting in the context of the public schools where freedom of speech is so fundamental, and where our religious pluralism is so substantial. While application of law can sometimes be unpredictable, good decisions can be made with common sense, a basic understanding of the legal principles, and overarching sensitivity to the principle that our schools are *public*, serving children of all faiths.

A. Constitutionally Protected Religious Environment

Public school authority is not required to banish all religious expression from our public schools. "The First Amendment was never intended to insulate our public institutions from any mention of God, the Bible or religion." *Crockett v. Sorenforson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983). Indeed, in some instances, the constitutional freedoms of speech and religion require governmental respect for, and accommodation of, religious expression in the public schools.

Students, as well as school employees, do not forfeit their constitutional rights at the "school house gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Religious expression by individuals is not second class speech, or a step-sister to secular speech. "[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment." *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (invalidating

permit requirements for religious speech in a public place); *Saia v. New York*, 334 U.S. 558 (1948) (invalidating an ordinance prohibiting the use of amplifying devices to broadcast religious messages).

The following scenarios generally illustrate protected religious expression in the public schools:

1. students discussing religion or reading religious literature during lunch or other free time[7];
2. students who meet at school before or after class on their own to pray among themselves and without disruption to others or school operation;
3. students expressing their religious viewpoints in assigned work — such as poems, class compositions, music and drawings — which are germane to the assigned projects;
4. students expressing their viewpoints, religious or otherwise, on their person or dress without disruption or in violation of any uniformly applied dress code.

Expression which is disruptive or which materially interferes with the rights of others, or which is lewd or obscene, may be prohibited and fairly disciplined. *Bethel*

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[7]Generally, also, the freedoms of expression and religion also protect teachers who privately discuss religious matters among themselves in their free time without disruption. While there is no absolute litmus test, public school teachers must be mindful that they are authority figures and agents of government. In such capacity, teachers may not use the machinery of the state to indoctrinate religion in a "captive audience." When acting for or on behalf of the public schools, teaching personnel are subject to the same principles of "neutrality" governing the governmental agency.

Sch. Dist. v. Fraser, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

School authority may also impose reasonable content-neutral "time, place and manner" rules which further their legitimate educational interests; for example, regulating student clubs' access to meeting rooms solely on a "first come-first served" basis or designating rooms or locations without regard to the content or views of the student groups. In such instances, the speaker's religious views or ideas (content) are not considered and school personnel are not motivated by hostility to the religious viewpoint. The decision or action is prompted instead by independent and legitimate secular reasons such as maintaining needed discipline or responsible management of facilities.

School personnel have broader authority to regulate expressive activity in class time or during other instructional periods. This reasonableness standard, while deferential to the work of the public schools, does not provide license to be arbitrary. Its meaning is illustrated in the following decision of the United State Supreme Court.

In *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Court examined the authority of the public schools over "school-sponsored" student speech; that is, speech which is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271. The Court upheld the right of public school authority to ensure that their instructional programs, which have not been opened up generally as a public forum for unrestricted communication, are reasonably restricted to their educational purposes:

> [W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. at 273.[3]

Hazelwood thus recognizes that public educators are entitled:

> [T]o assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play dissociate itself not only from speech that would substantially interfere with (its) work . . . or impinge upon the rights of other students, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or

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[3]*Hazelwood* specifically concerned the right of school authorities to control the content of a high school newspaper produced as part of the journalism curriculum. The student newspaper in this case did not operate autonomously. Students received grades and academic credit and their articles were customarily reviewed by school administrators as part of the curriculum. The Court upheld censorship of student editorials discussing student pregnancies and referencing sexual activity considered inappropriate for younger students. The Court determined that the school principal's concern for student privacy and suitability of material was reasonable given the circumstances.

> profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices. . . .

Id. at 271-272 (citations and internal quotes omitted).

Hazelwood however should not be read as authority to impose viewpoint censorship. While administrators and teachers may discipline and grade appropriately student expression or conduct which does not conform to their academic requirements, students should not penalized solely because their religious viewpoints appear in their work if their work otherwise conforms to the assignment.

These freedoms of individual speech and religious expression are important concerns of the law. Circumstances may exist where such expression must be accommodated because no important governmental interests are at stake. Where such interests are at stake, such as to preserve order and discipline, school authority may take reasonable and appropriate action.

B. Establishment of Religion: "Real Threat or Mere Shadow"

Public school personnel must have a basic understanding of the constitutional prohibition against their establishing religion in the public schools — not only because it is a most cherished restraint, but also to avoid suppressing protected speech in mistaken fear of endorsing religion. Public school authority must have "the ability and willingness to distinguish between real threat and mere shadow." *Abingdon Sch. Dist. v. Schempp*, 83 S. Ct. 1560, 1616 (1963).

In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, __ U.S. __, 113 S. Ct. 2141, 124 L. Ed. 2d 352

(1993), for example, the United States Supreme Court found that a public school had violated the freedom of speech and religion in selectively excluding a community religious group from equal access to school facilities after hours. Public school fears about endorsing religion were simply not justified. A uniformly applied "equal access" policy after hours, the Court reasoned, did not realistically suggest school imprimatur of the viewpoint of any organization. And, the benefits to religion in allowing equal access to meeting space, without any special privileges, were incidental.

The Establishment Clause, like the Free Exercise Clause, has as its central purpose the protection of religious liberty and individual conscience. The United States Supreme Court has stated that the Establishment Clause accomplishes this purpose by erecting a mandatory "wall of separation between Church and State." *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947). While the metaphor of a wall has become commonly used, it can be deceiving. The wall is not so high or so "wooden" as to absolutely proscribe any governmental action which indirectly or incidentally benefits religion.

The United States Supreme Court has realistically acknowledged that " 'total separation is not possible in an absolute sense'. . . . Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility to any." *Lynch v. Donnelly*, 465 U.S. 668, 672-673 (1984).

Fortunately or unfortunately, there are no "bright lines" for determining whether governmental action has crossed the line and established religion. The United State Supreme Court itself has remarked that the

Establishment Clause erects a " 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " 465 U.S. at 679. While not confining itself to any particular test, the Court has however traditionally applied a three-part test (also known as the "Lemon test") in searching for impermissible establishment.[9] In brief, the "Lemon test" requires that governmental action:

- be animated by a secular purpose(s) or motive(s);
- have a primary effect which neither advances nor inhibits religion; and
- does not foster excessive entanglement with religion.

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[9]Unless and until overruled, the "Lemon test" provides the required conceptual framework. The "Lemon test" has received substantial criticism from several quarters, including justices on the Court favoring a more predictable, less result-oriented test. Justice Antonio Scalia has described this traditional test in picturesque terms:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .

Writing for the majority, Justice White responded:

> While we are somewhat diverted by Justice Scalia's evening at the cinema ... we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., __ U.S. __, 113 S. Ct. 2141, 2148 n.7 and 2149, 124 L. Ed. 2d 352, 363 n.7 and 365 (1993).

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

In other words, government decisions motivated by purely religious goals will ordinarily be invalidated. And, even when governmental action is animated by secular interests, it will nonetheless fail if its primary effect advances or inhibits religion or infuses government excessively in religious affairs. The United States Supreme Court, for example, has invalidated statutes authorizing voluntary student Bible readings at the opening of each school day over the intercom system or directly in class by a classroom teacher. The primary effect of such practice impermissibly advanced religion in the public schools. The Court found it immaterial that dissenting students could leave or that religious readings responded to the needs of the majority. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause").[10]

The Court has likewise invalidated a state law providing for "a moment of silence" where the evidence established no purpose other than to introduce voluntary prayer into the public schools. *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). And, in *Stone v. Graham*, 449 U.S. 39, 41 (1980), the Court invalidated the government posting of the Ten Commandments in the public schools where

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[10]A federal district court in Virginia enjoined the teaching of optional Bible classes "as a religious exercise" in the Bristol City public schools. It was immaterial that the program was optional and that students received no grade or academic credit. *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983). Manifestly, the giving of credits for religious instruction would be constitutionally suspect.

there was no showing that the posting was genuinely part of any secular instructional program or other non-religious purpose:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.

Stone, 449 U.S. at 42.

The requisite "neutrality" in matters of religion does not mean that the Bible or other religious material can not be studied for its artistic and literary worth, for example, when objectively presented as part of a secular program. The Court has recognized that public education may not be complete without a study of our religious heritage or balanced comparison of religions. *School Dist. v. Schempp*, 374 U.S. 203 (1963). In such circumstances, the governmental motive or design is not the advancement of religion, the primary effect is to further secular educational goals, and a balanced academic study of religion ordinarily does not entangle government in religious affairs.

The Court has also found no genuine establishment concerns in providing community religious groups "equal access" to meeting rooms after hours. *Lamb's Chapel*, __ U.S. __, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). And, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court found no establishment with a city's display of a creche in a downtown park. While a creche has manifest religious significance, the Court found that the display was designed to, and had the primary effect of, recognizing a holiday with deeply rooted secular and religious origins.

In contrast, and illustrating how the facts and specific context may control the outcome, the Court invalidated a creche display in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Despite the secular motives of government, the particular setting of a creche dominating a grand staircase in a county courthouse had the unavoidable and primary effect of enhancing religion. The Court noted its fundamental question in each case whether:

> "[T]he challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S. at 597.

Judicial concern for the appearances of governmentally established religion have been particularly acute in the public school context. The population served not only contains a "captive audience" by reason of state law, but a population susceptible to misapprehension in an environment geared to shaping values. *See, for example, School Dist. v. Ball*, 473 U.S. 373, 390 (1985). ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.")

Similarly, in *Lee v. Weisman*, __ U.S. __, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), the Court invalidated pervasive governmental participation in graduation prayer. The Court also communicated concern for coercive pressure brought to bear on those students who do not, for religious reasons or philosophical reasons, wish

to participate but must attend to obtain the benefits of their graduation exercise.

While *Lee* has produced substantial debate as to its meaning in other fact situations, *Lee* signals the risk of courts' finding government participation in prayer at school sponsored events. This risk is pronounced when, as a result of governmental action, school benefits and privileges are conditioned on actual or symbolic participation by objecting students in religious exercise. In such circumstances, the purported "voluntary" character of the activity is disingenuous:

> The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored belief. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.

Weisman, 112 S. Ct. at 2665, 120 L. Ed. 2d at 493.

In some cases, as with an "equal access" to meeting rooms policy, the circumstances may however suggest to the reasonable student that the public schools have not sought to sponsor religion:

> [T]here is a crucial difference between *government* speech [or action] endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

Mergens, 496 U.S. at 250.

Because of the variety of factual contests and the many court decisions which appear to be unpredictably fact-intensive, a common sense sensitivity to the proper role of a *publicly* supported school operation, with great potential for influence and shaping values, should always be a foundational guidepost. School leadership, responsibly sensitive to the religions [*sic*] pluralism in the public schools, is critical to providing learning environment equal to all and hostile to none:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

School Dist. v. Schempp, 374 U.S. 203, 308 (1963) (requoted in *Lee*, 112 S. Ct. at 2661, 120 L. Ed. 2d at 488).

APPENDIX C

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

"...Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools.... For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."

President Clinton
May 30, 1998

Dear American Educator,

Almost three years ago, President Clinton directed me, as U.S. Secretary of Education, in consultation with the Attorney General, to provide every public school district in America with a statement of principles addressing the extent to which religious expression and activity are permitted in our public schools. In accordance with the President's directive, I sent every school superintendent in the country guidelines on *Religious Expression in Public Schools* in August of 1995.

The purpose of promulgating these presidential guidelines was to end much of the confusion regarding religious expression in our nation's public schools that had developed over more than thirty years since the U.S. Supreme Court decision in 1962 regarding state sponsored school prayer. I believe that these guidelines have helped school officials, teachers, students and parents find a new common ground on the important issue of religious freedom consistent with constitutional requirements.

In July of 1996, for example, the Saint Louis School Board adopted a district wide policy using these guidelines. While the school district had previously allowed certain religious activities, it had never spelled them out before, resulting in a lawsuit over the right of a student to pray before lunch in the cafeteria. The creation of a clearly defined policy using the guidelines allowed the school board and the family of the student to arrive at a mutually satisfactory settlement.

In a case decided last year in a United States District Court in Alabama, (*Chandler v. James*) involving student initiated prayer at school related events, the court instructed the DeKalb County School District to maintain for circulation in the library of each school a copy of the presidential guidelines.

The great advantage of the presidential guidelines, however, is that they allow school districts to avoid contentious disputes by developing a common understanding among students, teachers, parents and the broader community that the First Amendment does in fact provide ample room for religious expression by students while at the same time maintaining freedom from government sponsored religion.

The development and use of these presidential guidelines were not and are not isolated activities. Rather, these guidelines are part of an ongoing and growing effort by educators and America's religious community to find a new common ground. In April of 1995, for example, thirty-five religious groups issued "Religion in the Public Schools: A Joint Statement of Current Law" that the Department drew from in developing its own guidelines. Following the release of the presidential guidelines, the National PTA and the Freedom Forum jointly published in 1996 "A Parent's Guide to Religion in the Public Schools" which put the guidelines into an easily understandable question and answer format.

In the last two years, I have held three religious-education summits to inform faith communities and educators about the guidelines and to encourage continued dialogue and cooperation within constitutional limits. Many religious communities have contacted local schools and school systems to offer their assistance because of the clarity provided by the guidelines. The United Methodist Church has provided reading tutors to many schools, and Hadassah and the Women's League for Conservative Judaism have both been extremely active in providing local schools with support for summer reading programs.

The guidelines we are releasing today are the same as originally issued in 1995, except that changes have been made in the sections on religious excusals and student garb to reflect the Supreme Court decision in *Boerne v. Flores* declaring the Religious Freedom Restoration Act unconstitutional as applied to actions of state and local governments.

These guidelines continue to reflect two basic and equally important obligations imposed on public school officials by the First Amendment. First, schools may not forbid students acting on their own from expressing their personal religious views or beliefs solely because they are of a religious nature. Schools may not discriminate against private religious expression by students, but must instead give students the same right to engage in religious activity and discussion as they have to engage in other comparable activity. Generally, this means that students may pray in a nondisruptive manner during the school day when they are not engaged in school activities and instruction, subject to the same rules of order that apply to other student speech.

At the same time, schools may not endorse religious activity or doctrine, nor may they coerce participation in religious activity. Among other things, of course, school administrators and teachers may not organize or encourage prayer exercises in the classroom. Teachers, coaches and other school officials who act as advisors to student groups must remain mindful that they cannot engage in or lead the religious activities of students.

And the right of religious expression in school does not include the right to have a "captive audience" listen, or to compel other students to participate. School officials should not permit student religious speech to turn into religious harassment aimed at a student or a small group of students. Students do not have the right to make repeated invitations to other students to participate in religious activity in the face of a request to stop.

The statement of principles set forth below derives from the First Amendment. Implementation of these principles, of course, will depend on specific factual

contexts and will require careful consideration in particular cases.

In issuing these revised guidelines I encourage every school district to make sure that principals, teachers, students and parents are familiar with their content. To that end I offer three suggestions:

First, school districts should use these guidelines to revise or develop their own district wide policy regarding religious expression. In developing such a policy, school officials can engage parents, teachers, the various faith communities and the broader community in a positive dialogue to define a common ground that gives all parties the assurance that when questions do arise regarding religious expression the community is well prepared to apply these guidelines to specific cases. The Davis County School District in Farmington, Utah, is an example of a school district that has taken the affirmative step of developing such a policy.

At a time of increasing religious diversity in our country such a proactive step can help school districts create a framework of civility that reaffirms and strengthens the community consensus regarding religious liberty. School districts that do not make the effort to develop their own policy may find themselves unprepared for the intensity of the debate that can engage a community when positions harden around a live controversy involving religious expression in public schools.

Second, I encourage principals and administrators to take the additional step of making sure that teachers, so often on the front line of any dispute regarding religious expression, are fully informed about the guidelines. The Gwinnett County School system in Georgia, for example,

begins every school year with workshops for teachers that include the distribution of these presidential guidelines. Our nation's schools of education can also do their part by ensuring that prospective teachers are knowledgeable about religious expression in the classroom.

Third, I encourage schools to actively take steps to inform parents and students about religious expression in school using these guidelines. The Carter County School District in Elizabethton, Tennessee, included the subject of religious expression in a character education program that it developed in the fall of 1997. This effort included sending home to every parent a copy of the "Parent's Guide to Religion in the Public Schools."

Help is available for those school districts that seek to develop policies on religious expression. I have enclosed a list of associations and groups that can provide information to school districts and parents who seek to learn more about religious expression in our nation's public schools.

In addition, citizens can turn to the U.S. Department of Education web site (http://www.ed.gov) for information about the guidelines and other activities of the Department that support the growing effort of educators and religious communities to support the education of our nation's children.

Finally, I encourage teachers and principals to see the First Amendment as something more than a piece of dry, old parchment locked away in the national attic gathering dust. It is a vital living principle, a call to action, and a demand that each generation reaffirm its connection to the basic idea that is America — that we are a free people who protect our freedoms by respecting the freedom of others who differ from us.

Our history as a nation reflects the history of the Puritan, the Quaker, the Baptist, the Catholic, the Jew and many others fleeing persecution to find religious freedom in America. The United States remains the most successful experiment in religious freedom that the world has ever known because the First Amendment uniquely balances freedom of private religious belief and expression with freedom from state-imposed religious expression.

Public schools can neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First Amendment and enrich the lives of their students.

I encourage you to share this information widely and in the most appropriate manner with your school community. Please accept my sincere thanks for your continuing work on behalf of all of America's children.

Sincerely,

s/ Richard W. Riley
Richard W. Riley
U.S. Secretary of Education

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their Bibles or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the applicable setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student or a group of students.

Students may also participate in before or after school events with religious content, such as "see you at the flag pole" gatherings, on the same terms as they may participate in other noncurriculum activities on school

premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging antireligious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach *about* religion, including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the

history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor

discourage students from availing themselves of an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral code that holds us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the First Amendment, student religious activities are accorded the same access to public school

facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include a prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media -- including the public address system, the school newspaper, and the school bulletin board -- to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well

as when it allows students to meet before and after the school day.

Revised May 1998

List of organizations that can answer questions on religious expression in public schools

Religious Action Center of Reform Judaism
Name: Rabbi David Saperstein
Address: 2027 Massachusetts Ave., NW, Washington, DC 20036
Phone: (202) 387-2800
Fax: (202) 667-9070
Web site: http://www.rj.org/rac/

American Association of School Administrators
Name: Andrew Rotherham
Address: 1801 N. Moore St., Arlington, VA 22209
Phone: (703) 528-0700
Fax: (703) 528-2146
Web site: http://www.aasa.org

American Jewish Congress
Name: Marc Stern
Address: 15 East 84th Street, New York, NY 10028
Phone: (212) 360-1545
Fax: (212) 861-7056

National PTA
Name: Maribeth Oakes
Address: 1090 Vermont Ave., NW, Suite 1200, Washington, DC 20005
Phone: (202) 289-6790
Fax: (202) 289-6791
Web site: http://www.pta.org

Christian Legal Society
Name: Steven McFarland
Address: 4208 Evergreen Lane, #222, Annandale, VA 22003
Phone: (703) 642-1070
Fax: (703) 642-1075
Web site: http://www.clsnet.com

National Association of Evangelicals
Name: Forest Montgomery
Address: 1023 15th Street, NW #500, Washington, DC 20005
Phone: (202) 789-1011
Fax: (202) 842-0392
Web site: http://www.nae.net

National School Boards Association
Name: Laurie Westley
Address: 1680 Duke Street, Alexandria, VA 22314
Phone: (703) 838-6703
Fax: (703) 548-5613
Web site: http://www.nsba.org

Freedom Forum
Name: Charles Haynes
Address: 1101 Wilson Blvd, Arlington, VA 22209
Phone: (703) 528-0800
Fax: (703) 284-2879
Web site: http://www.freedomforum.org

(14)

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IN THE

Supreme Court of the United States

CORRECTED COPY

GOOD NEWS CLUB, *et al.*,
Petitioners

v.

MILFORD CENTRAL SCHOOL,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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November 30, 2000

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INTEREST OF AMICUS CURIAE [1]

Amicus Liberty Legal Institute is an organization committed to the defense of religious liberty and the protection of rights under the First and Fourteenth Amendments. Among its activities, the Institute assists individuals, students, and organizations in challenging state restrictions on, or discriminatory treatment on the basis of, religious beliefs or expression. The decision of the Second Circuit in this case hinders the Institute's ability to assert the right of its clients and members to gain equal access to school facilities and other expressive fora, regardless of the religious viewpoint contained in their message.

STATEMENT OF THE CASE

Amicus adopt the statement of the case presented in the Brief for Petitioners. For the Court's convenience, amicus sets forth below the facts most salient to the analysis that follows.

In August 1992, the Milford Central School adopted the Community Use Policy. Under the Policy, district residents may use the school's facilities for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public." *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000). Pursuant to the Policy, the Milford Central School opened its facilities to such private organizations as the Boy Scouts, the Girl Scouts, and the 4-H Club. See *id.*

The School, however, denied access to the Good News Club, a community-based Christian youth organization. That decision was based on an exclusion contained in the Policy: "School

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[1] Petitioners and Respondent have consented to the filing of this brief. Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

premises shall not be used by any individual or organization for religious purposes." *Id.* This exclusion is essentially identical to school district Rule 7 at issue in *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993): "The school premises shall not be used by any group for religious purposes." *Id.* at 387.

School Superintendent Robert McGruder also based his decision to exclude the Good News Club on an interpretation of New York Educ. Law § 414 that precludes the use of school property for religious purposes. See *Good News Club* v. *Milford Cent. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998). This interpretation is the same as the reading of § 414 addressed by the Court in *Lamb's Chapel*. See 508 U.S. at 386-87 (quoting *Trietley* v. *Board of Educ. of Buffalo*, 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978)).

The Good News Club filed suit, alleging an infringement of the First and Fourteenth Amendments. The district court held that the School could properly exclude the Club because it had not opened its facilities to religious instruction or prayer. The Second Circuit found that the "activities of the Club clearly and intentionally communicate Christian beliefs by teaching and by prayer" and affirmed. *Good News Club*, 202 F.3d at 509. The court suggested that exclusion of the Club's religious message was especially necessary because "those who attend the school are young and impressionable." *Id.*

SUMMARY OF ARGUMENT

This case is about equal access to physical facilities. It is not about government aid to religion. It is not about the impressionability of schoolchildren.

This case is a straight-line descendant of *Widmar* v. *Vincent*, 454 U.S. 263 (1981); it is the near-identical twin of *Lamb's Chapel*, *supra*. These antecedents establish that the Free Speech and Free Exercise Clauses prescribe, and the Establishment

Clause does not proscribe, equal access to school facilities regardless of the religious content of the speaker's message.

To decide this case, the Court need only apply the settled rule "that schools may not discriminate against religious groups by denying them access to facilities that the schools make available to all." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (citing *Lamb's Chapel*, *supra*, and *Widmar*, *supra*). Respecting the Good News Club's right of equal access to the school's physical facilities would in no way contravene the prohibition on direct state funding of religious activities. This case, therefore, is not one that "requires courts to draw lines, sometimes quite fine," *id.* at 847, in order to delimit the boundaries of competing constitutional principles.

The impressionability of schoolchildren is irrelevant to the endorsement analysis. It defies logic to suggest that the government should act in a less neutral or more discriminatory manner toward impressionable children. Impressionability works both ways. If students would misinterpret neutrality as endorsement, then they would doubly interpret official discrimination against the Good News Club as disapproval of its religious message. Doubly, because first they would correctly interpret the exclusion as evincing hostility toward religion and second their impressionability would graft an extra layer of intensity onto this message of disapproval. A constitution that requires "that a government practice not have the effect of communicating a message of government . . . disapproval of religion," *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring), perforce prohibits a message that is doubly effective in disapproving of religion. Neutrality through equal access protects against both an incorrect perception of endorsement and a justified perception of stark hostility toward religion.

In any event, the relevant audience for any message the school sends by erecting the forum for private speech and

respecting the Good News Club's right of access thereto is the reasonable, informed observer, and not the students. Here, as in all forum access cases, the government sends a message only by erecting and maintaining the forum; that message is transmitted to the community at large and is judged by the objective standard of the reasonable, informed observer. See *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring in part and concurring in the judgment).

Even if students were the relevant audience, their impressionability would not lead them to misinterpret a message of neutrality. "The proposition that schools do not endorse everything they fail to censor is not complicated."*Board of Educ. of Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). There is little reason to assume that children who can exercise the right to protest against the Vietnam War, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), or to refuse, based on religious scruples, to salute the flag, see *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), cannot appreciate that neutrality means neutrality. Any confusion in this simple message would not be cleared up by discrimination. Schools have a pedagogical obligation to educate students about the Constitution, not to violate it.

ARGUMENT

I. RESPECTING THE GOOD NEWS CLUB'S RIGHT OF EQUAL ACCESS TO SCHOOL FACILITIES WOULD SEND A MESSAGE OF NEUTRALITY TOWARD AND NOT ENDORSEMENT OF RELIGION.

Any message sent by respecting the Good News Club's right of equal access would be "one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutral-

ity but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality opinion). The Good News Club asks only that the Milford Central School provide access to its facilities equally to private organizations, that the school remain neutral as to the secular or religious content of their message. To deny this simple request, as the school did, is to impermissibly "treat people differently based on the God or gods they worship, or do not worship." *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Fealty to neutrality in this case would not brush up against the prohibition of direct aid to religion. In order to remain neutral here, the government would not need to fund religious activities directly. The school would need only to provide access on equal terms to religious and nonreligious groups alike. This case, therefore, is a garden-variety facilities access case controlled by *Lamb's Chapel* and *Widmar*.

A. Providing Equal Access Sends a Message of Neutrality, Whereas Exclusion Bespeaks Hostility Toward Religion.

The School has created a forum to further secular purposes by opening school doors for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community." *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 504 (2d Cir. 2000). Granting religious groups access to the forum does not violate the Establish ment Clause because "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality opinion).

Respecting the Club's right of access would say only that the School is consistent and neutral in applying the Community Use Policy, that it neither endorses nor approves of the Club's message. "Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would

think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Lamb's Chapel*, 508 U.S. at 395; see also *Widmar*, 454 U.S. at 274 ("[A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices."). "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker," *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring in part and concurring in the judgment), and thus in creating the forum the school "does not thereby endorse or promote any of the particular ideas aired there." *Widmar*, 454 U.S. at 272 n.11.

That access does not equal endorsement is readily apparent here, where groups such as the Boy Scouts, the Girl Scouts, and the 4-H Club had used school property well before the Good News Club sought to hold meetings there. In this case, as in *Lamb's Chapel*, "District property had repeatedly been used by a wide variety of private organizations." 508 U.S. at 395. Granting the Club access would simply put it on par with other private organizations and require it to compete with other groups so that its message would be heard and heeded. In this cacophonous bazaar, "any perception that the [school] endorses one particular viewpoint would be illogical." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 850 (1995) (O'Connor, J., concurring). The only natural perception would be that the school, by creating the forum, has remained neutral through a hands-off policy.

But, of course, the School did not keep its hands off this particular forum. Rather, it expressly silenced religious voices by excluding them: "School premises shall not be used by any individual or organization for religious purposes." *Good News Club*, 202 F.3d at 504.

Exclusion bespeaks hostility: "Withholding access would leave an impermissible perception that religious activities are

disfavored." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). The words and actions of the School in this case project a clear message to the community that religion is a second-class viewpoint on moral and personal development, not worthy to share company with secular private organizations. "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality opinion).

Such discrimination is unconstitutional. "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original). Because "government generally may not treat people differently based on the God or gods they worship, or do not worship," *id.* at 714, the Court has consistently required that "a government practice not have the effect of communicating a message of endorsement or disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); see also *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) ("This insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all.").

This is not a case "where religious speech threatens to dominate the forum." *Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring). The school facilities are used by private groups such as the Girl Scouts, the Boy Scouts, and the 4-H Club. The Good News Club would compete with these and other groups for space and time allocation, the students' interest, and, yes, their agreement with the Club's message. Such robust competition in a relatively open forum minimizes the risk that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Capitol Square*, 515 U.S. at 777

(O'Connor, J., concurring in part and concurring in the judgment).

None of the red flags that would signal forum domination—"the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue," *id.* at 778—are raised in this case. On the contrary, the specific characteristics of the forum at issue here significantly minimize the danger of religious domination. The Milford Central School is just like the public schools the Court has seen in past equal access cases; it teaches children of all ages from kindergarten through high school. The Good News Club requested access not to classroom facilities but to the school cafeteria, see *Good News Club* v. *Milford Cent. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998), a non-instructional space used by students of all grades. For the period when the District Court's preliminary injunction granted the Club access to school facilities, meetings were held in an upper-level resource room: "one half of it is for a high school resource room, the other half is taught by another special education teacher for kids that are slightly younger than high school age, 12 and 13 years." J.A. N12-N13 (testimony of Peter Livshin). Participation in the Good News Club would occur after school, outside of instructional class time, and would require written parental permission. See *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 507 (2d Cir. 2000).

Moreover, the Good News Club advocates morals from a Christian perspective just as the films in *Lamb's Chapel* promoted child rearing according to Christian family values. The Second Circuit distinguished religious viewpoint from religious instruction and held that the Good News Club falls into the latter category because it adds an "additional layer" of religiosity to its moral message by insisting that "these morals or these values are senseless without Christ." *Good News Club*, 202 F.3d at 509-10. This distinction, however, is logically meaningless and constitutionally problematic. The Good News Club's call to faith is no different from an entreaty for "returning to traditional, Christian family values instilled at an early stage." *Lamb's Chapel*, 508 U.S. at 388. Any viewpoint worth its salt asserts its truth; all theories entreat adherence; and all teachings seek converts. Moreover, "[t]here is no indication when 'singing hymns, reading scripture, and teaching biblical principles' cease to be 'singing, teaching, and reading'—all apparently forms of 'speech,' despite their religious subject matter–and become unprotected 'worship.'" *Widmar*, 454 U.S. at 270 n.6. Allowing (or requiring, as the Second Circuit would) school officials to make these fine metaphysical distinctions invites excessive entanglement with religion and heightened viewpoint discrimination.

B. Granting the Good News Club Equal Access to School Facilities Would Not Implicate the Prohibition on Direct Aid to Religion.

Governmental neutrality toward religion, "one hallmark of the Establishment Clause," *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring), holds even in a hard case, where faithful application of the neutrality principle brushes up against the prohibition on direct aid to religion. That situation "requires courts to draw lines, sometimes quite fine," *id.* at 847, in order to delimit the boundaries of competing constitutional principles. See *Mitchell* v. *Helms*, 120 S. Ct. 2530, 2560 (2000) (O'Connor, J., concurring in the judgment) ("Our school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule.").

This is not that hard case. The Court need not draw any new boundaries here. It need only hew to the clear line of precedent established by *Widmar*, *Lamb's Chapel*, and other equal access cases. Respecting neutrality in this case would in no way implicate the traditional prohibition on direct funding of religious activities. Any benefit flowing to religion from the provision of equal access to school facilities is neither direct nor funding.

The Court's Establishment Clause cases draw two distinctions in addressing cases dealing with governmental assistance, most notably for educational purposes. The first is whether the assistance is in kind or in money. Where the government gives money to religious organizations, the Court asks the second question, whether the funding is direct or indirect. Both inquiries serve the same purpose—to ensure that the government does not take money from some taxpayers and give to others to finance their religious activities.

Access to school and other public facilities falls on the constitutional side of both these distinctions; denial of access, on the other hand, violates the religious speaker's Free Speech and Free Exercise rights and the Establishment Clause prohibition on government discrimination against religion.

First, by providing access to its facilities, the school would not be funding the religious activities of the Good News Club. The constitutional concern is that the government is using its coercive power to require one taxpayer to finance the religious activities of another. See *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring) (distinguishing student activities fees from "general assessments in support of religion that lie at the core of the prohibition against religious funding and from government funds generally") (citations omitted).

That concern is not present where the government provides nonmonetary benefits to religious and nonreligious groups alike in a neutral program, such as the provision of equal access to school facilities. Because no government funds flow to the religious group, there is little danger that the government is financing private worship. Access does not require the state to open its coffers, only that the school open its doors. Facilities access cases instead pose a different constitutional danger: "Withholding access would leave an impermissible perception that religious activities are disfavored." *Id.* at 846.

Second, giving the Good News Club access to the school's physical facilities would not provide direct support to religion.

Rather, any benefit to the Good News Club would only be incidental to the direct secular goal of establishing a neutral forum for healthy expression of views under the First Amendment.

Even where the state funds religious groups, such monetary payments are permissible if the aid to religion is indirect. In *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), the Court unanimously upheld state payment of a blind student's tuition at a sectarian theological institution. The Court emphasized that the tuition money "is paid directly to the student, who transmits it to the educational institution of his or her choice." *Id.* at 487. Likewise, the Court approved state reimbursement of children's bus fares to attend Catholic schools. See *Everson* v. *Board of Educ. of Ewing*, 330 U.S. 1, 17-18 (1947). That the funding to the religious schools was indirect permits the injection of the critical element of private decisionmaking: "The aid to religion at issue here is the result of petitioner's private choice." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment). Any "endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid" and not those who simply distribute such aid. *Mitchell*, 120 S. Ct. at 2559 (O'Connor, J., concurring in the judgment).

The distinction between direct and indirect funding underlies the Court's insistence that "secular government aid not be diverted to the advancement of religion." *Id.* at 2558. The Court in *Tilton* v. *Richardson*, 403 U.S. 672, 683 (1971), upheld federal building subsidies to religious institutions only with the insistence that the subsidized buildings not be used for religious purposes. However, the "Court has similarly rejected 'the recurrent argument that all aid [to parochial schools] is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" *Widmar*, 454 U.S. at 275 n.15 (quoting *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)) (alterations in original). That is why "nothing in *Tilton* suggested a limitation on the State's capacity to maintain open

forums equally open to religious and other discussions." *Id.* at 272 n.12.

Respecting religious speakers' right of access to an expressive forum does not have the primary effect of advancing religion. Rather, any benefit to religion is "merely incidental" to the goal of establishing an expressive forum, even if it is "foreseeable" that religious groups would seek access to the forum. See *id.* at 273. Thus, the Court in *Agostini* v. *Felton*, 521 U.S. 203 (1997), upheld New York's Title I funding program because "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231. Under those circumstances, the "aid is less likely to have the effect of advancing religion." *Id.*

This case, of course, is steps removed from school aid cases like *Agostini* and *Mitchell*. The school is public and not a private religious institution. No funds go to religious organizations. If the Constitution permits religious organizations to obtain access to generally available government programs in those cases, as the Court has rightly held, then it requires such access here because "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring). Indeed, this case is easier than *Rosenberger* because the Good News Club seeks equal access to school facilities and not to government funds. Here, no "bedrock principles collide," *id.* at 852, and the Court need only stay the course charted by *Widmar* and *Lamb's Chapel*.

II. THE IMPRESSIONABILITY OF SCHOOLCHILDREN IS IRRELEVANT TO THE ENDORSEMENT ANALYSIS.

There is no logical reason why a message of neutrality changes to one of religious endorsement because schoolchildren are "impressionable." Impressionability works both ways. If

schoolchildren are indeed impressionable, then they would be as susceptible to perceiving any action that disfavors religious speech as disapproval of religion as they would be to perceiving any action that favors religious speech as endorsing religion. Access to school facilities on equal terms, neither favoring nor disfavoring religious speech, avoids the danger of both types of impressions. If schoolchildren, or any other persons, would misinterpret neutrality as endorsement, then they would doubly interpret official discrimination against the Good News Club as disapproval of its religious message. They would correctly interpret the exclusion as evincing hostility toward religion. Their putative impressionability would then graft an extra layer of intensity onto this message of disapproval. If impressionability mattered, then denying the Good News Club access would indeed doubly violate the requirement "that a government practice not have the effect of communicating a message of government . . . disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

In any event, the relevant audience for any message the school sends by erecting the forum for private speech and providing equal access thereto is the reasonable, informed observer, and not the students. By providing equal access, the government simply sends a message to the community at large. That message is judged from the perspective of a hypothetical observer who is well informed and reasonable. *Capitol Square*, 515 U.S. at 773, 780 (O'Connor, J., concurring in part and concurring in the judgment). To focus on the impressionability of schoolchildren here would be to abandon the objective standard of a hypothetical observer in favor of the subjective impressions of specific persons who by happenstance observe the government action.

Even if students were the relevant audience, neutrality does not transform into endorsement when viewed by impressionable eyes. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. of*

Westside Cmty. Sch. v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). A child is not "a dimwit as a matter of law." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 785 (1995) (Souter, J., concurring in part and concurring in the judgment). There is little reason to assume that children who can exercise the right, say, to protest against the Vietnam War, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), or to refuse, based on religious objections, to salute the flag, see *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), cannot appreciate that neutrality means neutrality.

A. Impressionability Works Both Ways: Schoolchildren Would Interpret the Exclusion of the Good News Club as Disapproval of Religious Viewpoints.

Any argument against equal access predicated upon the schoolchildren's impressionability crumbles under its own weight. An impressionable person would more readily perceive the denial of access to school facilities as a message of hostility toward the Club's religious viewpoint. The Establishment Clause requires "that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). If the age and maturity of children mattered, then they would matter for deviations in both directions from the neutral benchmark, toward either impermissible endorsement or impermissible disapproval. Respecting neutrality protects against both dangers.

In fact, an argument that impressionable children would misconstrue a neutral message as one of religious endorsement works doubly against its proponents. If impressionability is so strong that it would, by its own force, move a child's perception away from the baseline of neutrality into the realm of endorsement, then its strength would double the perception that denial of access sends a message of hostility toward religion. Children

would first correctly perceive the discrimination against the Good News Club as a message of disapproval; "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. Impressionability would graft onto this correct perception an extra layer of intensity that no amount of naysaying by school administrators could plausibly counteract.

At its core, the Establishment Clause is about the value of inclusion in our pluralistic society. "If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community." *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter* 492 U.S. 573, 627 (1989) (O'Connor, J., concurring). Correspondingly, the government cannot disapprove of the religious practices and beliefs of adherents without sending a clear message that they are outsiders and less than full members of the political community. The clarity of the message of hostility is only sharpened when delivered to impressionable schoolchildren.

B. Constitutionality Turns on the Objective Perceptions of a Hypothetical Reasonable, Informed Observer and Not on the Subjective Impressions of Particular Persons.

In any event, the suggestion that the impressionability of schoolchildren matters in this case rests on a fundamental fallacy—that the students are the relevant audience for constitutional analysis. Endorsement instead is determined by an objective standard of a hypothetical reasonable observer and not the subjective perceptions of particular persons. Thus, whether the government message in this case endorses religion depends not on the impressions of students but on the objective

perceptions of a reasonable observer. This hypothetical observer is not impressionable or obtuse, but well-informed and "aware of the history and context of the community and forum." *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment).

Whether the government has endorsed religion turns on the objective perceptions of the reasonable observer, and not on the subjective impressjons of any specific person or group of persons. See *id.* at 773. Constitutionality therefore does not depend on the perspective of an "eggshell" observer or, indeed, of any particular observer. As Justice O'Connor explained, "we do not ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the display, or whether some reasonable person might think the State endorses religion." *Id.* (internal quotations and alterations omitted).

In this case, as in *Capitol Square* and other equal access cases, the state creates and maintains a forum in which private speech can be expressed. The question, therefore, is whether by providing religious speakers access to the forum the government has endorsed religion. Save the possibility of forum domination by religious speakers, the Court's answer to this question has been consistently in the negative, that the message is "one of neutrality rather than endorsement." *Id.* at 776 (quoting *Mergens*, 496 U.S. at 248 (plurality opinion)).

Observers of the government action need not participate in the forum in order to perceive any message–of neutrality, endorsement, or hostility—that the government sends by creating and maintaining the forum. And, of course, the "hypothetical" reasonable observer does not actually participate in the forum in order to receive and judge the government message. Therefore, particular characteristics of specific forum participants–be they obtuse or keenly observant, impressionable or obdurate—simply do not matter for Establishment Clause analysis. The only government action here is the creation and

maintenance of the forum for such private speech; the only message equal access sends is one of neutrality; and the audience for this message is the community at large and not the forum participants specifically. To account for particular characteristics of students or other persons at the place where the forum happens to be would be to abandon the objective standard of the reasonable observer for the subjective impressions of specific observers.

The constitutional focus on a hypothetical observer who is informed and reasonable explains why the concurring justices in *Capitol Square* did not share the concern expressed by Justice Stevens in dissent that children may see the unattended display of a cross and form an impression that the government was endorsing religion. See *id.* at 808 n.14 (Stevens, J., dissenting) ("But passersby, including schoolchildren, traveling salesmen, and tourists as much as those who live next to the statehouse, are members of the body politic, and they are equally entitled to be free from government endorsement of religion."). State action does not violate the Establishment Clause simply because "some passersby would perceive a governmental endorsement" of religion. *Id.* at 779 (O'Connor, J., concurring in part and concurring in the judgment). "There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Id.* at 780 (emphasis in original).

There is little danger in this case that a reasonable observer would perceive that "the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement." *Id.* at 777 (emphasis in original). The plurality in *Mergens* did note that "secondary school students are mature enough and are likely to understand that a school does not

endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250. As explained above, younger students would just as likely understand that neutrality means neutrality; their impressionability works both ways to heighten any perception of endorsement or hostility engendered by deviations from this neutral benchmark. That students may participate in the activities of the Good News Club only with parental permission, see *Good News Club* v. *Milford Cent. Sch.*, 202 F.3d 502, 507 (2d Cir. 2000), eliminates any residual danger that the school, and not the parents, is endorsing the Club's message.

Moreover, attributes of the forum at issue in this case mitigate against any perception that the state is endorsing religion to impressionable schoolchildren. Meetings would be held after school. The school is not an elementary school. Rather, it teaches children from kindergarten through high school. And The Good News Club requests access not to classroom facilities but to the school cafeteria, a non-instructional space used by students of all ages and grades. And while the Club has access to school facilities under the preliminary injunction, meeting were held in an upper-level resource room: "one half of it is for a high school resource room, the other half is taught by another special education teacher for kids that are slightly younder than high school age, 12 and 13 years." J.A. N12-N13 (testimony of Peter Livshin). If recognizing a religious student group and granting it equal access to classroom facilities after instructional hours does not convey a message of endorsement, as the Court rightly held in *Mergens*, then simply granting the Good News Club, a private organization, equal access to non-instructional space after school *a fortiori* would not endorse religion.

It is of little moment that the Good News Club seeks access to school facilities from 3:00 p.m. to 4:00 p.m. There is no reason why it is permissible for a club to meet at 8:00 p.m. but not earlier, when it is more convenient. The Court's cases clearly distinguish noninstructional time from classroom time because the latter present "problems of 'the students' emulation

of teachers as role models' and 'mandatory attendance requirements.'" *Mergens*, 496 U.S. at 251 (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987) and citing *Illinois* ex rel. *McCollum* v. *Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 209-10 (1948)). None of those problems are presented in this case because no teachers are involved and attendance is entirely voluntary, with parental permission.

And there is good reason for parents to want their children to participate in afterschool youth activities such as those offered by the Scouts, the 4-H Club, the Good News Club, and other private organizations. "[T]he prime-time for juvenile crime is during the afterschool hours, and .... specifically, 40 percent of the juvenile violent offenses occurred after 3 PM and before 8 PM." JAMES ALAN FOX, U.S. DEPARTMENT OF JUSTICE, TRENDS IN JUVENILE VIOLENCE 3 (1996). "It doesn't take a Ph.D. to figure out that young people need some place positive to go afterschool to stay off the streets and out of their empty homes." Jonathan Alter, *It's 4:00 p.m.; Do You Know Where Your Children Are?*, NEWSWEEK, Apr. 28, 1998, at 29.

Nothing stops schools from opening their premises on a nondiscriminatory basis so that outside groups can provide programs for children during the time period when parental demand is highest. Nothing in the Constitution forces the school to close its facilities to religious groups, and religious groups alone, during children's waking hours. Any message that the school would send by such equal access is one of neutrality, that the school respects the work of the private organizations without regard to their religious viewpoints, or lack thereof.

C. Schoolchildren, However "Impressionable," Would Not Misinterpret the Provision of Equal Access as an Endorsement of Religion.

The impressionability of schoolchildren would not lead them to misinterpret a message of neutrality. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion). The

simplicity of this proposition is even more apparent when a school provides a variety of groups equal access to its facilities. The school cannot be seen as endorsing the diverse (and potentially conflicting) views of all the groups. If children are impressionable to one group's message, then they are equally impressionable to those of the other groups. Impressionability thus would enhance the clarity of conflict among the viewpoints of the various speakers vying for the children's attention and agreement and, if anything, would better underscore the neutrality of the school's hands-off policy.

Permission does not equal endorsement. That is especially true in the educational context, where space is needed for student expression that is neither enjoined nor endorsed by the school. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992). Providing such an expressive space by allowing equal access to school facilities does not implicate the school in any speech that may be delivered in that forum. See *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.10 (1981) (noting that "by creating a forum the University does not thereby endorse or promote any of the particular ideas aired there"). The reason for this is simple: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker," *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 786 (1995) (Souter, J., concurring in part and concurring in the judgment).

That the school does not endorse the message of private speakers is especially clear where, as here, the forum accommodates a variety of divergent viewpoints. The Scouts advocate moral and personal development through service and devotion to God and country; the 4-H Club through agrarian pursuits; the Good News Club through a life in Christ. Given this wide array of viewpoints, "any perception that the [school] endorses one particular viewpoint would be illogical." *Rosenberger* v. *Rector*

& Visitors of Univ. of Va., 515 U.S. 819, 850 (1995) (O'Connor, J., concurring). The illogic of such a perception is only more apparent in the eyes of "impressionable" schoolchildren. If children are impressionable to the message of the Good News Club, then they would be equally impressionable to that of the Scouts, the 4-H Club, and whomever else may use the school facilities.

The suggestion of impressionability betrays a suspicion of children unsupported by the Court's precedent. A child has the right, based on religious scruples, not to salute the flag. See *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). The Court did not assume that children were too impressionable to appreciate their freedom of religious expression and to exercise their right not "to declare a belief." *Id.* at 631. Nor was there any suggestion that classmates would perceive permission to abstain from saluting the flag as an endorsement of the objecting student's religion. Likewise, the Court respected children's right to protest against the war in Vietnam, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), without concern that the impressionability of children would distort the message.

To be sure, certain characteristics—"the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing," *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) (plurality opinion)—may justify different treatment of children. This solicitude of children's immaturity, however, stems from the need to protect them from societal threats. See *Ginsberg* v. *New York*, 390 U.S. 629, 638 (1968) (obscenity); *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944) (child safety); *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988) (disruption of school); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986) (same); *New Jersey* v. *T.L.O.*, 469 U.S. 325, 346-48 (1985) (same). Here, the only threat presented is that children, who attend meetings voluntarily with

parental permission, would agree with the message of one or the other speakers in the school's forum. That is not a threat. It is the First Amendment working, and well.

All this, of course, is not to deny that schoolchildren are different from adults or that schools have an important role in their development. It is precisely because children are still in the formative stages of life that the right message must be sent by school officials and state action. That right message is straightforward: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992).

Clearing up any confusion in this message is the essence of civic education: "the risk of misunderstanding can be minimized by explaining what is misunderstood—by teaching students about the values of free speech, public fora, disestablishment, and government neutrality toward religion." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 20 (1986). Especially where children are impressionable, schools have a pedagogical obligation to educate them about the Constitution, not to violate it.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioners, the decision below should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF CHILD EVANGELISM FELLOWSHIP, INC., MAE CULBERTSON, LADETTE ARMSTRONG, MARSHA HALL, MARY TOMMILA, FAMILY RESEARCH COUNCIL, FELLOWSHIP OF CHRISTIAN ATHLETES, AND CAMPUS CRUSADE FOR CHRIST IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI*

Certain of the *amici* are plaintiffs in a similar dispute pending in the U.S. Court of Appeals for the Ninth Circuit. *Amici* Armstrong, Hall, and Tommila desire that their children attend Good News Club meetings. They desire that those meetings occur on the premises of Oakridge Elementary School, for reasons of safety and convenience.

Detailed statements of the interests of the *amici curiae* are set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.[1]

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Petitioners.

SUMMARY OF ARGUMENT

The School District contends that the Establishment Clause forbids the Good News Club to meet immediately after school hours on the premises of the Milford Central

[1] Pursuant to Rule 37.6, the *amici* disclose that: (1) no counsel for a party authored this brief, in whole or in part; and (2) counsel for the *amici* have applied for a grant from the Alliance Defense Fund to cover expenses in producing this brief. ADF is a 501(c)(3) organization with offices at 8960 E. Raintree Drive, Suite 300, Scottsdale, AZ 85260. ADF exercised no control over the content of this brief.

School. The *amici* anticipate that this argument will take two forms. First, the School District will argue that a policy granting equal access to religious groups would constitute an impermissible endorsement of religion. Second, the School District has argued and presumably will argue that allowing the Club to meet after school for religious purposes is indistinguishable from the practices struck down in *McCollum v. Board of Education*, 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000).

An equal access policy would not fail the endorsement test as it has been articulated, justified, and applied in this Court's precedents. A well-informed reasonable observer would not infer endorsement of religion from a policy of equal treatment. Speculation about the perceptions of young children does not warrant ignoring the perceptions of the reasonable observer. Establishment Clause values would be undermined, not served, by censoring private religious speech to avoid potential misimpressions about the government's relationship to that speech. Second, an equal access policy is utterly unlike the practices invalidated in cases like *McCollum*, *Engel*, *Weisman*, and *Santa Fe*.

ARGUMENT

I. Granting the Good News Club Equal Access to Meeting Space Would Not Violate the Endorsement Test.

In a number of cases reaching this Court, government agencies claimed that the Establishment Clause justified

their discrimination against religious speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). In each, the Court held that equal treatment of the religious speech in question would not violate the Establishment Clause.

The non-discriminatory character of a policy governing speech was an important factor to all Justices rejecting the government's Establishment Clause defense. *See, e.g., Rosenberger*, 515 U.S. at 839 ("a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion"); *id.* at 846 (referring to the Court's "insistence on government neutrality toward religion") (O'Connor, J., concurring); *Pinette*, 515 U.S. at 764 ("we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion") (plurality op.); *id.* at 775 ("[n]one of this is to suggest that I would be likely to come to a different result from the plurality where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly") (O'Connor, J., concurring).

In this case, Milford argues that an equal access policy would nonetheless violate the Establishment Clause.[2] To prevail, the School District must overcome the

[2] The Second Circuit did not rule on Milford's Establishment Clause defense. Nonetheless, if the Court credits

fact that neutrality, at the very least, goes a long way towards ensuring the validity of a policy governing private speech. At the outset, their contention contradicts the view held by four Justices that equal treatment of religious speech in a public forum *never* violates the Establishment Clause. *See Pinette*, 515 U.S. at 770 (plurality op.).

Other Justices hold the view that there may be circumstances in which evenhanded policies governing private speech violate the Establishment Clause because they convey a message of endorsement despite their facial neutrality. In her concurring opinion in *Pinette*, Justice O'Connor expressed her view that "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism." 515 U.S. at 774 (O'Connor, J., concurring). She stated that "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Id.* at 777.

For example, a private religious group might so dominate a public forum that "a policy of equal access is transformed into a demonstration of approval." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) (citing *Widmar*, 454 U.S. at 275). "Other circumstances may produce the same effect – whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others."

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the Club's Free Speech Clause claim, the *amici* encourage the Court to decide the Establishment Clause question.

Id. at 778. For example, although the group in *Pinette* sought to display its cross under a facially neutral policy, Justice O'Connor observed that "certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message – particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings." *Id.* at 776 (O'Connor, J., concurring). *See also Pinette*, 515 U.S. at 785 ("one would not be a dimwit as a matter of law to think that an unattended religious display there was endorsed by the government") (Souter, J., concurring).

The question, then, is whether this case presents circumstances in which a non-discriminatory access policy would undermine Establishment Clause values. The *amici* submit that it does not.

A. The Reasonable Observer Would Not Perceive School District Endorsement of the Club.

Milford's forum has long been open to those wishing to express religious viewpoints on "secular" subjects, and there is no evidence that such speakers (if any) have dominated the forum. There is no reason to believe that those engaging in worship or religious instruction would dominate the forum if granted equal access. If given access, the Good News Club would simply join the Boy Scouts, Girl Scouts, 4-H, and others meeting in Milford Central School after hours. The Club's religious expression would not be out in the open, as was the religious message in *Pinette*, *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), thus

minimizing the possibility that the reasonable observer would attribute their speech to the School District. Indeed, the expression here is not an unattended display, the sponsor of which is not always self-evident, but rather actual speech coming from the mouths of readily identifiable speakers. Moreover, an empty classroom after regular school hours is not the kind of prominent place that might raise suspicions about the government's stance towards the speech there. *See County of Allegheny*, 492 U.S. at 599-600.

The hypothetical reasonable observer[3] would not perceive endorsement of religion were the School District to give the Good News Club the same access afforded other groups. The reasonable observer would be aware of the evenhandedness of Milford's policy, and would know that a variety of groups – religious and secular – had taken advantage of the privileges available under that policy. The reasonable observer would understand that the Club is a private organization independent of the School District. Relatedly, the reasonable observer would know that school officials do not participate in Club meetings or take steps to encourage attendance at those meetings. The reasonable observer would know that parents, not the school or even the children themselves, decide whether a child will attend a Club meeting.

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[3] As discussed in more detail below, the observer whose perceptions matter for purposes of the endorsement test is the well-informed, objective, hypothetical reasonable observer. *See Pinette*, 515 U.S. at 773 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711-12 (1985) (O'Connor, J., concurring) ("objective observer").

For these reasons, the reasonable observer would not perceive government endorsement of religion if Milford gave the Club equal access to its facility.

B. The Age of the Children Does Not Justify a Different Analysis or Result.

Milford apparently will contend that the Establishment Clause justifies discriminatory exclusion of the Club from the forum given that elementary-age children attend Club meetings and attend Milford Central School, a school that has students in grades kindergarten through twelve. The *amici* anticipate that they will argue that the children in these age ranges will infer School District endorsement of the Club and that the Establishment Clause requires the School District to exclude the Club in order to prevent such misperceptions.

1. Problems associated with eschewing the reasonable observer.

By focusing Establishment Clause analysis on speculation about what children might perceive, Milford proposes a wholesale reconfiguration of the endorsement test. Presumably it does not suggest the utter rejection of the hypothetical, well-informed, reasonable observer described by Justice O'Connor in her *Pinette* concurrence. Instead, one can presume, it wishes to limit the circumstances in which that observer's perceptions matter. In other words, Milford suggests that the context should determine the identity and characteristics of the observer whose perceptions matter, even to the point of relying

upon an observer whose perceptions are objectively unreasonable. This Court should reject its invitation to such a radical rewriting of the endorsement test.

At the outset, Milford's proposal raises a host of vexing questions. In what circumstances would the perceptions of the well-informed, hypothetical reasonable observer still matter? What is the principled basis for confining her influence to that (as yet undefined) class of cases? How many different "observers" would appear on the legal landscape? What varying degrees of knowledge and understanding might they possess?

Pity the lower federal courts, which would be forced to confront such a dizzying array of new, analytically antecedent questions in every Establishment Clause case. And pity government officials trying to steer a course that will avoid lawsuits brought under either the Free Speech Clause or the Establishment Clause. Much of the criticism leveled at the endorsement test has asserted that it is insufficiently concrete. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 668-679 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). Whatever the validity of such a critique in the past, there can be no doubt that this accusation would ring true if the identity of the observer whose perceptions "count" changed from context to context.

Aside from the practical problems with the School District's suggestion, its proposal is at odds with the theoretical foundations of the endorsement test. At bottom, the endorsement test seeks to discern the meaning of government action in the political community as a whole,

asking whether the government has made religion relevant to citizens' standing in the political community. *Lynch*, 465 U.S. at 692. In enforcing the Establishment Clause, the Court's concern "is with the political community writ large." *Pinette*, 515 U.S. at 779 (O'Connor, J., concurring). By urging the Court to focus on the possible misperceptions of children, Milford ignores this fundamental focus of the endorsement test.

The precise identity of the observer(s) whose perceptions the School District thinks should matter is not clear. Perhaps the perceptions of actual children matter in their view. Perhaps it is the perceptions of the "average" child. And perhaps it is the perceptions of a hypothetical "reasonable child," a creature unknown to the law. In each case, the test will focus not on the political community writ large, but upon some subset of the population. This is inconsistent with the repeated insistence that endorsement analysis not be conducted this way. For example, Justice O'Connor's concurring opinion in *Pinette* states that "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated adherents from the discomfort of viewing symbols of a faith to which they do not subscribe." 515 U.S. at 779 (O'Connor, J., concurring). Justice O'Connor "disagree[d] that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge." *Id.*

Focusing on the unreasonable misperceptions of children cannot be squared with the description of the reasonable observer's attributes in *Pinette*. Justice O'Connor wrote separately largely to emphasize that "the endorsement test necessarily focuses upon the perception of a

reasonable, informed observer." 515 U.S. at 773 (O'Connor, J., concurring). She disagreed with Justice Stevens about the quantum of knowledge attributed to the test's reasonable observer, declaring that the observer should be deemed "more informed than the casual passerby postulated by Justice Stevens." *Id.* at 779.

In her view, "the endorsement test creates a more collective standard to gauge 'the "objective" meaning of the [government's] statement in the community.' " *Id.*

> In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'

Id. at 779-80 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 175 (5th ed. 1984)).

To replace the reasonable observer, who "is presumed to possess a certain level of information that all citizens might not share," with a child is to turn the endorsement test on its head. The reasonable observer is the polar opposite of most children, whose need to be conformed to community ideals of reasonable behavior is a primary rationale for education and parenting. Instead of looking to a "community ideal" to determine the meaning of the government's action in the political community, the School District would have this Court look to the opposite end of the spectrum to determine the constitutionality of private religious speech in public places.

The Establishment Clause does not categorically forbid the government from taking any action that might cause someone to believe that it is endorsing religion. Put differently, Americans do not possess an absolute, inviolable "right" to be free from any perception – however inaccurate or unreasonable – that the government is endorsing religion. Were it otherwise, scores of previously permissible actions would become impermissible.

Justice O'Connor's concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), is instructive. In agreeing that Alabama's moment of silence law violated the Establishment Clause, she wrote separately to explain why moment of silence laws in other states would pass constitutional muster. Justice O'Connor observed that the typical statute "calls for a moment of silence at the beginning of the schoolday during which students may meditate, pray, or reflect on the activities of the day." 472 U.S. at 71. She distinguished such statutes from the practices invalidated in *Engel v. Vitale* and *Abington School District v. Schempp*, 374 U.S. 203 (1963). A moment of silence, unlike prayer or devotional Bible reading, is not inherently religious. *Id.* at 72. Moreover, a student could participate in the moment of silence without compromising his or her religious beliefs. *Id.*

Justice O'Connor did not consider whether a young child might infer government endorsement of prayer from the government's moment of silence requirement. Such an inference is not implausible; nonetheless, it did not affect the analysis. Justice O'Connor explained that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state

endorsement of prayer in public schools." 472 U.S. at 76. A moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass the test." *Id.*

The result in this case is *a fortiori*. The permissible moment of silence laws identified by Justice O'Connor in her *Wallace* concurrence permitted children to engage in prayer during compulsory class time. One cannot doubt that non-praying children would almost certainly know that certain of their classmates were praying, and that the school had afforded them the opportunity so to do. Indeed, it is quite possible that both praying and non-praying children would infer school endorsement of prayer from the moment of silence. Yet this was not material to Justice O'Connor, who continued to hold the view that only the perceptions of the knowledgeable, objective observer are relevant to endorsement analysis. 472 U.S. at 76, 78.

2. Examining children's unreasonable misperceptions is unsupported in law.

Milford may try to use this Court's dicta, in certain Establishment Clause cases, about the relative impressionability or immaturity of young children to support its position. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383, 385, 390 (1985); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). These statements do not support examining and

deeming material the unreasonable misperceptions of some children.

It is common ground that the Establishment Clause forbids government from engaging in religious indoctrination, from coercing citizens to participate in religious exercises, and from directly and tangibly supporting indoctrination undertaken by others. *See, e.g., Santa Fe Independent Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000); *Mitchell v. Helms*, 120 S. Ct. 2530 (2000); *Engel v. Vitale*, 370 U.S. 421 (1962). To the extent that it is germane at all, the impressionability of young children is relevant to the application of *these* principles rather than to the identity of the observer whose perception of the relationship between church and state matters under the endorsement test. In other words, the alleged susceptibility of younger children to "indoctrination" does not mean that the Court should abandon the reasonable observer when younger children are in the picture.

The Court's cases suggest that whether government's own or government-sponsored religious speech will tend to "indoctrinate" may depend in part upon the nature of the audience to that speech. For example, a legislative chaplain's prayer is unlikely to "indoctrinate" individual legislators. *Marsh v. Chambers*, 463 U.S. 783 (1983). Also, adult legislators are far less likely to be coerced into joining the chaplain's prayers than are those attending public school football games or graduation exercises. *Compare Marsh with Santa Fe*, 120 S. Ct. 2266, and *Lee v. Weisman*, 505 U.S. 577 (1992).

This Court has expressed concern about the susceptibility of young children to indoctrination only when *the*

government itself engages in religious expression or directly and tangibly supports religious indoctrination. *See, e.g., Tilton*, 403 U.S. 672; *Edwards*, 482 U.S. 578. For example, this Court has stated that government aid to a religious college is less likely to support indoctrination than aid to a religious elementary school, in part because college students are simply less susceptible to efforts at indoctrination than are young children. *Tilton*, 403 U.S. at 686.

As a consequence, the *Tilton* Court deemed aid to religious universities less problematic than aid to secondary and elementary parochial schools (a program of which was invalidated the same day in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). In addition to observing that religious universities are far less likely to engage in what one might call "indoctrination," the Court noted that "college students are less impressionable and less susceptible to religious indoctrination" and that "[t]he skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations." *Id.* at 686.

In short, the age of children has been relevant to this Court in the sense that younger children are more susceptible to indoctrination and pressure to participate in religious exercises like prayer than are older children and adults. This impressionability is simply a different issue than the possibility that young children will erroneously infer government endorsement of religion from governmental equal treatment of religion. Because the Milford School District is not engaging in religious expression, coercing others to participate in religious exercise, or

directly and tangibly supporting religious indoctrination,[4] the age of the children involved in this case is not relevant.

In only one case has the Court relied upon the alleged inability of young children accurately to discern the relationship between the state and religion in striking down government conduct under the Establishment Clause. In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), in which the Court struck down public aid to religious schools, Justice Brennan stated that interaction between church and state "is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." 473 U.S. at 390. The Court held that Grand Rapids' support of parochial schools was unconstitutional in part because such support provided a "crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school." *Id.* at 385. In other words, even though the aid programs neutrally supported both secular and religious nonpublic schools, the Establishment Clause forbade Grand Rapids from engendering this perception.

Of course, the "symbolic union" component of the *Ball* Court's reasoning was expressly repudiated by this Court in *Agostini v. Felton*, 521 U.S. 507 (1997). The

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[4] It is too late in the day to argue that granting equal access to meeting space, without more, implicates the Establishment Clause's "no aid" principle.

Agostini Court observed that its more recent cases had "undermined the assumptions upon which *Ball* and *Aguilar* [*v. Felton*, 473 U.S. 402 (1985)] relied." 521 U.S. at 222. One of these was the assumption that "[t]he presence of public teachers on parochial school grounds . . . created a 'graphic symbol of the "concert or union or dependence" of church and state,' especially when perceived by 'children in their formative years.' " *Id.* at 220. The Court declared that its 1993 decision in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), had repudiated the assumption underlying *Ball* and *Aguilar* that "the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion." 521 U.S. at 224. Nowhere does the Court's opinion suggest that the cognitive abilities of elementary school children changed dramatically between 1985 and 1997; instead, the *Agostini* Court simply understood that a child's misperception of neutrality as endorsement should not drive Establishment Clause analysis.

Milford may argue that dicta in two other opinions suggest that the age of children might affect endorsement analysis. In *Widmar v. Vincent*, the Court concluded that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274. In a footnote supporting this conclusion, the Court noted that "[u]niversity students . . . are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n. 14. In *Board of Education v. Mergens*, a school district argued that its compliance with the Equal Access Act

would cause secondary school students to perceive official support of religious clubs. 496 U.S. at 249. In a portion of her opinion joined by three other Justices, Justice O'Connor rejected this contention in part because "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250.

The *amici* anticipate that the School District will invoke these statements in arguing that the Establishment Clause justified its action. At the outset, it is difficult to square such an argument with this Court's disinclination to differentiate among various levels of schools in other Establishment Clause cases. For example, Justice O'Connor stated that the "insistence on government neutrality toward religion explains why we have held that *schools* may not discriminate against religious groups by denying them equal access to facilities that the *schools* make available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) (emphasis added). Similarly, in *Santa Fe*, the Court declared that "nothing in the Constitution as interpreted by this Court prohibits *any* public school student from voluntarily praying at any time before, during, or after the schoolday." 120 S. Ct. at 2281 (emphasis added). Furthermore, neither *Agostini* nor *Mitchell v. Helms* deemed it significant that some of the schools receiving aid were elementary schools.

In addition, the plurality opinion in *Mergens* itself cites *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), for the proposition that students can understand the distinction

between neutrality and endorsement. *Mergens*, 496 U.S. at 250 (plurality op.). One of the students in *Tinker* attended junior high school, and there can be little doubt that *Barnette* applies to elementary school students. Finally, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor did not differentiate between elementary and secondary school students in assessing the validity of Alabama's moment of silence law. Indeed, she repeatedly referred to the "objective observer" and emphasized that he or she would be "acquainted with the Free Exercise Clause and the values it promotes." 472 U.S. at 76, 77, 83.

To the extent that Milford may attempt to read into *Widmar* and *Mergens* some dicta about elementary schools, it should be repeated that *Agostini* rejected *Ball*'s "symbolic union" rationale. In discussing (but ultimately rejecting) the Westside Board of Education's endorsement claim, Justice O'Connor acknowledged that the Court had "invalidated the use of public funds to pay for teaching state-required subjects at parochial schools, in part because of the risk of creating 'a crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school.' " *Mergens*, 496 U.S. at 250 (quoting *Ball*, 473 U.S. at 385). Although Justice O'Connor rejected the extension of *Ball*'s reasoning in part because of the relative maturity of secondary school students, one can now safely say that the Court's subsequent decision in *Agostini* repudiates *Ball*'s approach without regard to the age of the children involved. Therefore, this Court should reject any effort by Milford to twist *Widmar* or *Mergens* to argue that the Establishment

Clause justified its discrimination against the Good News Club.

Milford also relies upon the defined scope of the Equal Access Act in arguing that a different outcome is warranted in the elementary school context. In its opposition to the Club's certiorari petition, Milford argued that the Equal Access Act's coverage of secondary school students meant that Congress had determined that students below the secondary school level could not understand government neutrality toward religion.

The Act itself refutes that argument, providing that "[n]othing in [the Act] shall be construed to authorize the United States or any State or political subdivision thereof . . . to abridge the constitutional rights of any person." 20 U.S.C. § 4071(d)(7). As the Ninth Circuit concluded in *Garnett v. Renton School District No. 403*, 987 F.2d 641 (9th Cir. 1993):

> Section 4071(d)(7) is a "savings" clause that protects against reading implications in the EAA which might abridge federal constitutional rights, either for persons and schools within its scope, or for those outside its scope, such as secondary school teachers and *elementary school students*.

987 F.2d at 645 (emphasis added). In § 4071(d)(7), Congress made clear that its protection of secondary school students was not to be used to restrict the constitutional rights of those not included in the coverage of the Equal Access Act.

II. Granting the Club Equal Access to School Facilities Does Not Pressure Students Into Participating in Religious Exercises.

In its opposition to the Club's petition for a writ of certiorari, Milford argued that if it allowed the Club to meet after school, it would run afoul of this Court's decisions in *McCollum v. Board of Education*, 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000). The government's conduct in those cases differs dramatically from the equal treatment the Club seeks in this case. An equal access policy would not implicate the Court's decisions in these cases.

In *Engel*, *Lee*, and *Santa Fe*, the Court concluded that the government was pressuring students to participate in prayer. In *Lee v. Weisman*, the Court invalidated a Rhode Island school district's practice of inviting local clergy to pray at school graduation ceremonies. By mandating a religious exercise at an event that students were, for all practical purposes, obliged to attend, the school district put those who objected to the prayers in the "untenable position" of choosing between appearing to participate and openly protesting. 505 U.S. at 593. The Court held that the Establishment Clause forbid placing school children in such a position. *Id.* Applying the principles set forth in *Lee*, the *Santa Fe* Court held that a Texas school district's pregame speech policy had "the improper effect of coercing those present to participate in an act of religious worship." 120 S. Ct. at 2280.

It cannot plausibly be argued that students are forced – either by law or the realities of social life in the school – to attend Good News Club meetings. Obviously, New York's truancy laws do not extend beyond the final bell of the day; students are not legally required to participate in *any* after-school meeting, much less the Good News Club meetings. In addition, Club meetings are plainly not like once-in-a-lifetime graduation ceremonies or even like weekly varsity high school football games. In those situations, the Court said that potentially coercive prayer was being added to events most students otherwise wanted to attend, *i.e.*, without regard to whether the event would include prayer. In contrast, students attend Good News Club meetings because their parents desire it and give written permission. Their parents know full well that prayer will be a significant part of the meetings. Unlike graduation ceremonies and football games, those attending Club meetings are present because of prayer, not despite it.

The School District may argue that some children will feel pressure from their peers to attend Club meetings. At the outset, the existence of such peer pressure, by itself, is not constitutionally impermissible. *See Board of Educ. v. Mergens*, 496 U.S. at 251 ("[t]o be sure, the possibility of student peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate"). The critical fact is that students cannot act on that pressure – and thereby participate in inherently religious activities – unless a parent so desires. This is quite different than the situation in *Engel*,

Lee, and *Santa Fe*, in which the pressure to pray was unmediated by parental involvement.[5]

Milford also argued in its opposition to the Club's certiorari petition that allowing the Club to meet would cause it to contravene this Court's ruling in *McCollum v. Board of Education*, 333 U.S. 203 (1948). In that case, of course, the Court struck down an Illinois school district's coordination of religious instruction on school property during compulsory time. The school district did not open its doors to outsiders other than those offering religious instruction. The instructors were "subject to the approval and supervision of the superintendent of schools." 333 U.S. at 208. Students who signed up for but failed to attend religious classes would be reported to their secular teachers. *Id.* at 209. The *McCollum* Court held that the "close cooperation between the school authorities and the religious council in promoting religious education" violated the Establishment Clause. 333 U.S. at 209.

Simply granting the Good News Club equal access to meeting space after school is obviously quite different

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[5] Milford or its *amici* may argue that religious groups like the Good News Clubs will not provide parents enough information about their activities to enable parents to make informed choices about their children's attendance. *Amicus* Child Evangelism Fellowship, Inc., which sponsors Good News Clubs around the country, provides its local volunteers with parental permission slips and brochures that plainly set forth the nature of its activities. In any event, such speculation about the willingness of religious groups to disclose their intentions and about the diligence of parents in learning about the meetings their children will attend does not justify a ban on religious group meetings in elementary schools.

than the close cooperation struck down in *McCollum*. *See Widmar*, 454 U.S at 272 n. 10 (distinguishing *McCollum*). Although Club meetings, like the religious instruction in *McCollum*, would occur on school grounds, those meetings would *not* occur during compulsory class time. Therefore, an equal access policy would not "afford[ ] sectarian groups an invaluable aid" by providing "pupils for their religious classes through use of the state's compulsory public school machinery." 333 U.S. at 212. To be sure, one might plausibly contend that the Club would "take advantage" of the state's compulsory education laws by holding meetings immediately after school. However, the Court's subsequent decision in *Zorach v. Clauson*, 343 U.S. 306 (1952), forecloses any suggestion that this violates the Establishment Clause. Indeed, *Zorach* declared that "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs," it does not violate the First Amendment. *Id.* at 313-14. In this case, the Club is not asking Milford to adjust the schedule of classroom instruction to suit its needs; it is simply asking that Milford give it the same after-hours access to meeting space available to other community groups.

By permitting the Good News Club to meet immediately after school, the School District would be simply facilitating and making more convenient parents' wishes about the moral development of their children. The Establishment Clause does not require a school district to go out of its way to make it more difficult for parents to pursue their wishes in this regard by categorically

banning such meetings or forbidding them from occurring immediately after school.

CONCLUSION

The *amici* respectfully request that this Court reverse the judgment of the Court of Appeals and remand the case for entry of judgment in favor of the Petitioners.

Respectfully submitted,

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APPENDIX

STATEMENT OF INTEREST

Child Evangelism Fellowship, Inc., (CEF) is a Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the local church for Christian living. In the United States and Canada, 700 full-time workers and an estimated 40,000 volunteers serve the ministry. CEF was founded by Jesse Irvin Overholtzer in 1937.

As of August 2000, 4,622 Good News Clubs were operating in the United States. Of these, 527 (about 11%) were meeting on public school property after regular school hours. The Court's decision in this case obviously will have a significant impact on CEF's ability to pursue its mission.

Mae Culbertson, Ladette Armstrong, Marsha Hall, and Mary Tommila are among the plaintiffs in *Culbertson v. Oakridge School District*, (In the United States Court of Appeals for the Ninth Circuit, No. 99-36165), a dispute similar to the case at bar.

In October 1995, the Oakridge (Oregon) School District denied a Good News Club continued access to school facilities despite a district policy "encourag[ing] the use of school buildings for community use, for educational and recreational purposes." Oakridge believed that granting the Good News Club access under this policy would violate the Establishment Clause. As a consequence of Oakridge's action, the Good News Club was forced to locate another location for its meetings, away

from the school campus. After Oakridge excluded the Club from school facilities, membership in the Club dropped dramatically. A number of parents expressed concerns about the safety of transporting children to an off-campus location.

The United States District Court for the District of Oregon ruled that Oakridge had violated the plaintiffs' rights under the Free Speech Clause and that the Establishment Clause neither required nor justified that violation. Oakridge appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals heard oral argument on March 6, 2000. In an order dated October 31, 2000, the Ninth Circuit panel withdrew submission of the case and deferred resolution pending this Court's issuance of an opinion in the instant case.

At all times relevant to the litigation, *amicus* Mae Culbertson was the volunteer instructor of the Good News Club meeting in Oakridge, Oregon. *Amici* Ladette Armstrong, Marsha Hall, and Mary Tommila are parents of children who attended Good News Club meetings in Oakridge.

The **Family Research Council, Inc., (FRC)** is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family and religious liberty issues that affect the nation. FRC is committed to

ensuring that the legacy of family, faith and freedom is not forgotten in America. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The mission of the **Fellowship of Christian Athletes (FCA)** is to present to athletes and coaches, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving Him in their relationships and in the fellowship of the church. Currently, FCA sponsors over 7,700 "huddles" involving an estimated 500,000 students at approximately 24% of the Nation's public schools. Many FCA huddles utilize public school facilities for after hours activities.

Campus Crusade for Christ is an interdenominational, religious organization whose purpose is to introduce people of all ages to the Gospel of Jesus Christ, to help Christian believers to grow in the faith, both through training and through building relationships with other believers, and to help Christian believers to be effective in communicating their faith with others. Among its missionary activities in the United States, Campus Crusade for Christ operates at least five ministries with a direct interest in this case. First, Children of the World is a ministry of Campus Crusade for Christ which has its focus in developing programs designed for elementary school aged children, and training for their parents, and other significant adults in their lives, to help them develop and grow in their Christian faith. In many cases, after-school clubs similar to the one which is the

subject of the within litigation, though not directly affiliated with Campus Crusade for Christ, use its training and materials. Campus Crusade for Christ, through its ministry division, Student Venture, operates after-school clubs for junior high school and high school students, and through its Campus Ministry division, sponsors clubs on college and university campuses. Campus Crusade for Christ, also distributes *The Story of Jesus for Children*, a theatrical film depicting the life of Jesus, based upon the Gospel of Luke, and told from a child's perspective. Campus Crusade for Christ offers other opportunities for training for young people through its Josh McDowell Ministries division.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS

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No. 99-2036

In The

Supreme Court of the United States

OCTOBER TERM, 2000

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

Carol Hood respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1] Mrs. Hood is the Petitioner in *Hood v. Medford Township Bd. of Educ.*, No. 00-845, *petition for cert. filed*, Nov. 22, 2000, which presents a question closely related to the one at issue here: whether a public school that has a

[1] All parties have consented to the filing of this brief, and their letters of consent accompany this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus*, her counsel, and its members made any monetary contribution to the preparation or submission of this brief.

policy of rewarding reading achievement by allowing students to bring in a favorite story from home to read aloud to the class, but then bars a student from reading his otherwise appropriate selection solely because it was based on a Bible story, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment. After issuing and withdrawing two separate panel opinions premised on mutually exclusive theories, the Court of Appeals for the Third Circuit reheard the case *en banc*. It then affirmed—by a 6-6 vote—the district court's decision that the school's actions were not viewpoint discrimination. *C.H. v. Oliva*, 990 F. Supp. 341, 353 (D.N.J. 1997), *aff'd by an equally divided en banc court*, 226 F.3d 1204 (3d Cir. 2000).

Undersigned counsel, The Becket Fund for Religious Liberty, represents Mrs. Hood in her Petition. The Becket Fund is a bipartisan and interfaith public-interest law firm that protects the free expression of all religious traditions.

The present brief suggests a refinement of the principles applied in *Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), for evaluating State restrictions on religious speech based on a fear that the State might appear to "endorse" such speech. In our view, when the State restricts private speech with that intent, the State necessarily engages in viewpoint discrimination. We understand that other briefs will discuss whether such viewpoint discrimination is justified in this case by a compelling governmental interest. Because of the narrow focus of this brief, we believe it will complement and not duplicate the briefs of the parties and so prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Whenever the State excludes private religious speech from a government forum in order to avoid endorsing religion, the State discriminates based on viewpoint. Though that discrimination may be justified by a compelling state interest, it is nonetheless viewpoint discrimination.

As a matter of law and logic, the object of an endorsement is a viewpoint, not a subject matter. It is well established that, in assessing whether the government engages in viewpoint discrimination, this Court will assess the government's intent in regulating private speech. And when the government suppresses private speech with the intent to avoid endorsing that speech, it is a viewpoint that the government fears endorsing.

Accordingly, under this Court's Establishment Clause jurisprudence, "endorsement" involves government's expressing a particular viewpoint about religion, namely, an impermissibly favorable viewpoint. Correspondingly, the Establishment Clause also prohibits the government's expressing the viewpoint of impermissible hostility to religion. The government is otherwise free to engage in expression on the subject matter of religion, so long as it avoids these prohibited viewpoints. *See, e.g., School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 225 (1963). Therefore, when the government intends to avoid endorsement in regulating a forum for speech, the government intends to avoid association with a *viewpoint*, not a *subject matter*.

Not surprisingly, then, where the government has restricted private religious speech in government fora with the intent to avoid endorsement, this Court has found those

restrictions to be viewpoint-based. *See, e.g., Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

Here, the Milford Central School intended to discriminate based on viewpoint. The School's stated purpose in excluding the Good News Club was to:

> ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof.

The Good News Club v. Milford Central Sch., 202 F.3d 502, 509 (2d Cir. 2000) (second alteration in original). The School, however, was not similarly concerned with appearing to "endorse" other viewpoints, no matter how controversial. Thus, by regulating speech with the intent to avoid selectively endorsing that speech, the School engaged in viewpoint discrimination.

Amicus therefore respectfully urges this Court to reverse the holding of the Second Circuit that the School's discrimination against religious speech was merely content-based, and to clarify for courts below that the government engages in viewpoint discrimination whenever it suppresses private speech with the intent to avoid endorsement of that speech. *Amicus* leaves to the parties and others the argument that the state's viewpoint discrimination in this case is not justified by a compelling state interest.

ARGUMENT

I. WHEN THE STATE'S PURPOSE IN SUPPRESSING PRIVATE RELIGIOUS SPEECH IS TO AVOID ENDORSING ITS MESSAGE, THE STATE NECESSARILY DISCRIMINATES BASED ON VIEWPOINT.

A. Whether the State Engages in Viewpoint Discrimination Depends Largely on the State's Intent in Creating and Administering the Forum.

In assessing whether the regulation of speech is viewpoint-based or content-based, this Court has emphasized the importance of ascertaining the government's *intent* in creating public fora and restricting access to them. The "'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of [agreement or] disagreement with the message it conveys.*'" *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (emphasis added, alteration in original).

Thus, the "government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction." *Rosenberger*, 515 U.S. at 829 (emphasis added). *See also National Endowment for the Arts*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas' . . .") (quoting *Regan v. Taxation With Representation*

of Wash., 461 U.S. 540, 550 (1983) (alteration in original); *Widmar v. Vincent*, 454 U.S. 263, 280 (1981) (Stevens, J., concurring) ("[T]he university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted.").

Conversely, the Court has found restrictions to be viewpoint-neutral when it was satisfied that the governmental purpose in regulating was not to favor or disfavor the speaker's perspective. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) ("There is, however, no indication that the school board *intended* to discourage one viewpoint and advance another." (emphasis added));[2] *Finley*, 524 U.S. at 587 ("[A] more pressing constitutional question would arise if government funding resulted in the imposition of a disproportionate burden *calculated* to drive 'certain ideas or viewpoints from the marketplace.'" (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)) (emphasis added)).

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[2]Of course, in a forum genuinely limited to certain subject matter, the government may constitutionally censor religious speech that falls outside of that subject matter. If, for example, a school asked a student to bring in a favorite story to read to his class, but he instead brought in a hymn or a prayer, his speech could be barred as outside of the proper subject matter of the exercise. But if he chose a story based on the Bible, and the government censored him in order to avoid the appearance of endorsing his choice, that would be viewpoint discrimination. This is not a fanciful hypothetical. It is the factual scenario presented in a case now pending before this Court on a petition for writ of *certiorari*. *Hood v. Medford Township Bd. of Educ.*, Petition No. 00-845 (filed Nov. 22, 2000). *Amicus* is the petitioner in that case.

The point is a simple one: Whenever the government *intends* to discriminate on the basis of viewpoint, it *does* discriminate on the basis of viewpoint.

B. When the State Intends to Avoid Endorsement of Religion, the State Necessarily Intends to Avoid Association with a Religious Viewpoint.

According to both the precedents of this Court and common usage, if the State excludes private religious speech from a government forum in order to avoid "endorsing" that speech, what the State intends to avoid "endorsing" is a *viewpoint*. Indeed, it is difficult to imagine what else the government could meaningfully fear endorsing other than a viewpoint; one does not "endorse" a subject matter.

This conclusion also follows from this Court's Establishment Clause jurisprudence. Although the government may typically favor or disfavor particular viewpoints as a part of its own speech, *see Board of Regents of Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346, 1357 (2000), it must avoid certain forms of expression with respect to religion. The government is *not* prohibited from speaking on the *subject matter* of religion. *See, e.g., School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 225 (1963) ("Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment."). Rather, the government is prohibited from expressing certain *viewpoints* on religion, namely, that of impermissible favor toward religion (endorsement), or of impermissible disfavor toward religion (hostility). *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S.

573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to *take a position* on questions of religious belief.") (emphasis added); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) ("The endorsement test . . . precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.") (O'Connor, J., concurring); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (government "may not . . . promote one religion or religious theory against another or even against the militant opposite."); *Township of Abington v. Schempp*, 374 U.S. at 225 ("the State may not . . . affirmatively oppos[e] or show[] hostility to religion"); *Allegheny*, 492 U.S. at 625 ("The government violates [the Establishment Clause] if it endorses or disapproves of religion.") (O'Connor, J., concurring).

Thus, when the government regulates private speech in government fora with the intent to avoid government endorsement of religion, the government necessarily intends to avoid association with a certain *viewpoint* about religion. Consistent with these principles, this Court has twice refused to characterize as mere subject-matter regulation the suppression of private religious speech in government fora, where the regulation was intended to avoid endorsing the religious viewpoints expressed in that speech. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

This Court should insist that these decisions mean what they say and so should require a finding of viewpoint discrimination when the State has regulated private religious speech in a government forum with the intent to avoid government endorsement of that speech. Though that

viewpoint discrimination may be justified by a compelling state interest, it is viewpoint discrimination nonetheless.[3]

II. IN THIS CASE, THE MILFORD CENTRAL SCHOOL HAS ENGAGED IN VIEWPOINT DISCRIMINATION.

The present case is a perfect example. Milford Central School is clearly engaging in viewpoint discrimination because it suppressed speech to avoid association with its viewpoint without a corresponding concern to avoid the endorsement of other views.

The School opened its forum for the purpose of:

> [S]ocial, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community.

202 F.3d at 504. And the School's intent in excluding The Good News Club is clear:

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[3] "This Court suggested in *Widmar v. Vincent*, 454 U.S. 263, 271 (1981), that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel*, 508 U.S. at 394 (parallel citations omitted, alteration in original). *Amicus* believes that this case, like *Widmar*, *Lamb's Chapel*, and *Rosenberger*, involves no Establishment Clause violation that may constitute a compelling interest. We leave that argument to the parties and other *amici*, but note that, even if the viewpoint discrimination here is found justifiable, it would remain viewpoint discrimination.

> [To] ensur[e] that students in its charge are not left with the impression that [it] endorses religious instruction in its school, or that it advances the beliefs of a particular religion or group thereof.

Id. at 509 (third alteration in original).

Notably, Milford Central School is not similarly concerned with "leaving the impression that it endorses" the policies of the 4-H Club or the Girl Scouts. Nor does it fear appearing to endorse the Boy Scouts' view that "homosexual conduct is not morally straight," or that they should not "promote homosexual conduct as a legitimate form of behavior." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2453 (2000). The State intends to exclude from its facilities the ideas of The Good News Club precisely because they present a viewpoint that the School fears endorsing.

The Court of Appeals, however, held that this was not viewpoint discrimination at all. Rather, the court explained, "religious instruction and prayer" are somehow different from other discussions on the subject of morality. 202 F.3d at 510.[4] But this Court has already rejected precisely this view. In *Widmar*, this Court explicitly refused to manufacture a "constitutional difference between religious

[4]The court below relied in large part on an earlier Second Circuit decision, *Bronx Household of Faith v. Community School Dist. No. 10*, 127 F.3d 207, 210 (2d Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), which held that New York City Board of Education regulations, which similarly permitted "uses pertaining to the welfare of the community," but forbade "religious services or religious instruction," were nonetheless viewpoint neutral.

'speech' and religious 'worship.' . . . [That] distinction . . . lacks a foundation in either the Constitution or in our cases, and . . . is judicially unmanageable." 454 U.S. at 271 n.9. *See also id.* at 269 n.6 (listing reasons for rejecting "a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech act[s]' constituting 'worship.'" (internal citation omitted)). This Court should reiterate that clear rejection and should instruct the lower courts that whenever the government suppresses speech in order to avoid endorsing it, the government has suppressed the speech based on its viewpoint.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* THE AMERICAN CENTER FOR LAW & JUSTICE, FOCUS ON THE FAMILY, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The American Center for Law & Justice ("ACLJ") is a nonprofit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued and participated as *amicus curiae* in dozens of cases before this Court and lower federal courts, and chief counsel Jay Sekulow has presented oral argument before this Court in numerous cases, including *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Board of Educ. v. Mergens*, 496 U.S. 226 (1990). ACLJ has a particularly strong interest in this case because ACLJ represented the church that prevailed in *Lamb's Chapel*, and this case involves a virtually identical policy of discrimination against religion.

Focus on the Family is a California nonprofit religious corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Focus on the Family produced and distributed the film series at issue in *Lamb's Chapel*.

The Ethics and Religious Liberty Commission of the Southern Baptist Convention is the ethics, moral concerns, public policy, and religious liberty agency of the Southern Baptist Convention, the Nation's largest Protestant denomination with nearly sixteen million members in 40,000 congregations. The Commission addresses moral and public policy concerns, such as the First Amendment issues raised in this case. All parties consent to the filing of this brief.[1]

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[1] No counsel representing a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Milford Central School ("Milford Central") has adopted a community use policy that expressly discriminates against religion. Although Milford Central generally opens up its facilities to a broad spectrum of "social, civic and recreational meetings and entertainment events," it expressly prohibits any use of "school premises . . . for religious purposes." *See* Pet. App. at A2-A3 (quoting school policy).

Nothing in the Establishment Clause remotely justifies or permits this facial discrimination against religion. This Court repeatedly has rejected the argument that the Establishment Clause requires the exclusion of religious groups from school facilities made available to other groups. Allowing the Good News Club access to meeting space on a non-discriminatory basis would involve no government aid to religion. Instead, such a neutral policy that permits private religious speech on a non-discriminatory basis would comport with the Establishment Clause's command that the government neither advance nor inhibit religion.

Milford Central attempts to defend its facial discrimination against religion on the theory that allowing the Good News Club on school premises would create the same dangers as on-campus release-time programs and state-sponsored school prayers. Milford Central's suggested analogies reflect a fundamental misreading of this Court's precedents. While a school policy that gave the Good News Club special access to school premises or that adopted the religious speech of the Good News Club as the school's own might well violate the Establishment Clause, a neutral policy of non-discrimination does not pose the same risks. This Court long ago rejected the notion that the Establishment Clause forbids all religious speech on school grounds. Allowing the Good News Club access on a non-discriminatory basis raises none of the concerns that led the

Court to strike down on-campus release-time programs and school-prayer policies.

Indeed, Milford Central's policy, far from drawing any justification from the Establishment Clause, affirmatively violates the non-discrimination principles reflected in the Establishment, Free Exercise, and Equal Protection Clauses. These provisions all prohibit government action that expressly discriminates against religion or actions motivated by religion. Even in areas where the government enjoys some discretion, such as in imposing topical restrictions on a limited public forum, it may not use forbidden criteria, like race and religion, as the express basis for unfavorable treatment. Accordingly, Milford Central's effort to defend its prohibition on meetings convened "for religious purposes" as something other than viewpoint-discrimination is to no avail. Even if that restriction does not discriminate against religious viewpoints in violation of the Free Speech Clause, it clearly discriminates against religion and religious motivation in violation of the Establishment, Free Exercise, and Equal Protection Clauses.

ARGUMENT

This case is almost an exact clone of *Lamb's Chapel*, even down to the text of the challenged policies. Accordingly, Milford Central's policy clearly violates the Free Speech Clause. This brief, therefore, focuses on Milford Central's claim that the Establishment Clause requires a different result here than in *Lamb's Chapel*. As explained below, not only does the Establishment Clause not justify Milford Central's policy, the Establishment, Free Exercise, and Equal Protection Clauses prohibit the policy's discrimination against religion.

I. PROGRAMS THAT PERMIT PRIVATE GROUPS TO USE PUBLIC FACILITIES ON A NEUTRAL BASIS DO NOT RAISE ESTABLISHMENT CLAUSE DIFFICULTIES

A. This Court's Precedents Establish that Programs that Combine Neutrality and Private Speech Avoid Establishment Clause Problems.

This Court's religion cases uniformly have stressed the importance of government neutrality toward religion. The neutrality principle has played a role in almost every effort to interpret the Establishment Clause. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Board of Educ. v. Allen*, 392 U.S. 236, 242-43 (1968).

Indeed, in the specific context of access to school facilities, this Court has emphasized that a policy of neutrality in no way necessitates or justifies the exclusion of religious speakers or religious topics. A neutral policy that puts religious speech on an equal footing with other speech does not violate the Establishment Clause. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel, supra*. Neutrality demands that a public school that opens its facilities to secular groups and speakers not only *may*, but *must*, offer those facilities to religious groups and speakers on an equal basis. *See, e.g., Lamb's Chapel*, 508 U.S. at 395-96. By treating religious and non-religious speech equally, the government ensures that "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality).

The principle of neutrality takes on special importance with respect to private speech in public forums. When the government opens up a forum to private speech on designated topics, it must remain scrupulously neutral. "[S]chools may not discriminate against religious groups by denying them equal access to facilities that the schools make

available to all." *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring) (citing *Lamb's Chapel*). The government may not forbid speech from a religious perspective without violating the Free Speech Clause of the First Amendment.

In addition to neutrality, this Court repeatedly has emphasized the distinction between direct government involvement in religious speech or activity and government toleration of private religious expression. As *Mergens* recognized, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 496 U.S. at 250 (plurality) (emphasis in original). The government avoids Establishment Clause difficulties when private groups—rather than the government—determine the content and topic of their speech. *See, e.g., Lamb's Chapel*, 508 U.S. at 395 (concluding that "permitting District property to be used [by a religious group] would not have been an establishment of religion under the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)").

In particular, programs that combine neutrality and private speech avoid any endorsement of religion. Facial neutrality lessens any perception of government endorsement of religion. What is more, the voluntary participation of outside groups and students ensures that the resulting speech is truly private speech, rather than government action. A school district does not endorse private speech that it permits on a non-discriminatory basis. *See, e.g., id.* at 395. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality). With the guarantees of neutrality and individual choice and control over content, "there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-42; *accord id.* at 848 (O'Connor, J., concurring).

This Court emphasized both of these themes—neutrality and the importance of individual control over participation and content—in *Rosenberger*. First, the Court observed that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In addition, the Court highlighted the critical "distinction between the University's own favored message and the private speech of students." *Id.* at 834. The Court then applied these principles to conclude that a neutral policy of reimbursing the printing costs of student magazines, whose content was entirely the product of student decisions, did not violate the Establishment Clause.

Rosenberger, of course, involved the more difficult context of financial aid to religious groups. When the government simply opens up a forum to outside groups on a neutral basis without providing any financial aid, Establishment Clause concerns are minimized. *See, e.g.*, 515 U.S. at 846-47 (O'Connor, J., concurring) (acknowledging that the monetary aid given to religious groups in *Rosenberger* made it a more difficult case than *Lamb's Chapel*). A neutral program in which private speakers control the content of their speech and receive no direct government aid does not present any risk of endorsement or establishment.

B. Allowing the Good News Club to Use School Facilities on a Neutral Basis Would Not Pose any Establishment Clause Problem.

By permitting the Good News Club to use its facilities on a neutral basis, Milford Central would adopt a neutral program permitting private control over private speech without government aid or endorsement. The Establishment Clause poses no obstacle to the adoption of this policy, and clearly does not justify Milford Central's current policy of discrimination against religion. *See infra.*

Allowing the Good News Club to use the facilities would promote, rather than violate, the key principle of neutrality.

Milford Central's current policy makes the school facilities available for a variety of "social, civic and recreational meetings and entertainment events," but expressly provides that "[s]chool premises shall not be used by any individual or organization for religious purposes." *See* Pet. App. at A3 (quoting school policy). This policy evidences hostility to religion. By removing the express prohibition on meetings conducted "for religious purposes," Milford Central would restore the neutrality that is the touchstone of Establishment Clause analysis.

Likewise, it is clear from Milford Central's policy that participating organizations, not the school, exercise control over content and topic. Moreover, to the extent students take advantage of programs provided by outside groups, such as the Girl Scouts, they do so as a result of the private choices of students and parents. The resulting speech is clearly private speech attributable to the Girl Scouts, rather than government speech attributable to the school. "Under these circumstances . . . , there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed. . . ." *Lamb's Chapel*, 508 U.S. at 395.

Finally, it bears emphasis that allowing the Good News Club to use school facilities would involve no government funding of the Club. This is a case of speech without aid. Allowing the Good News Club access to school facilities would implicate none of the difficult questions raised by the provision of monetary aid that this Court approved in *Rosenberger*.

In short, the Establishment Clause provides no cover for Milford Central's exclusion of the Good News Club. To the contrary, Milford Central's facial discrimination against meetings convened "for religious purposes" creates, rather than avoids, Establishment Clause difficulties. As explained below, Milford Central's facial discrimination against

religion and religious motivations runs afoul of not just the Establishment Clause, but the Free Exercise and Equal Protection Clauses as well. What is more, Milford Central's decision to forbid meetings with "religious purposes" necessitates government monitoring of meetings to ensure the absence of religious motivation. This is precisely the kind of entanglement that the Establishment Clause prohibits.

This concern is far from hypothetical. Milford Central's Superintendent refused the Good News Club's request to hold meetings on school premises because "he understood the Good News Club's proposed use of the facilities to be 'the equivalent of religious worship . . . rather than the expression of religious views or values on a secular subject matter.'" Pet. App. at A9 (quoting denial letter). The Establishment Clause requires school districts to avoid such inquiries into religious content and motivation. *See, e.g., Rosenberger*, 515 U.S. at 836-37, 844-45.

A policy of neutrality would avoid this entanglement without violating the Establishment Clause. There would be no government control over speech and no monetary aid. Allowing the Good News Club to participate on a neutral basis, far from violating the Constitution, "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

II. ALLOWING THE GOOD NEWS CLUB TO USE SCHOOL FACILITIES ON A NEUTRAL BASIS RAISES NONE OF THE CONCERNS IMPLICATED BY POLICIES AUTHORIZING SCHOOL PRAYER OR ON-CAMPUS RELEASE-TIME PROGRAMS

Milford Central attempts to defend its decision to exclude the Good News Club on the theory that allowing the Club to use school facilities would be tantamount to authorizing

official school prayers or on-campus release-time programs. Opp. Cert. at 9-10. Milford Central reasons that this Court would find the Club's participation unconstitutional just as it struck down the on-campus release-time program in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), and the school-prayer policies in *Engel v. Vitale*, 370 U.S. 421 (1962), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

These suggested analogies ignore the nature of the school's actions and the emphasis this Court has placed on neutrality and private speech. First, Milford Central's argument ignores the reality that, far from authorizing a special benefit for religious groups, Milford Central discriminates against religion. Removing that discrimination—and allowing religious groups to participate on an equal basis—does not create the same dangers that troubled the Court in *McCollum* and the school-prayer cases. More broadly, Milford Central simply ignores the importance of neutrality and the fundamental distinction between private speech and government speech. A neutral program that allows private speakers to participate on an equal basis does not raise the concerns implicated when the government oversees religious education or composes official prayers.

A. Milford Central's Suggested Analogies Ignore the Fundamental Difference Between this Case and Those on Which It Relies.

Milford Central's analogy between what the Good News Club seeks and what the Court struck down in *McCollum* and the school-prayer cases is fundamentally flawed. In *McCollum*, *Engel*, *Lee*, and *Santa Fe*, the Court confronted school policies that provided some special benefit for religion. In *McCollum*, the school authorized certain religions to provide religious education on campus during school hours. In *Engel*, the State authorized the reading of

an official prayer. The school in *Lee* provided guidelines for the commencement prayer, while the Court found that the school sponsored the student prayers in *Santa Fe*. Here, by contrast, the school has not authorized any special benefit for religion. To the contrary, Milford Central has affirmatively discriminated against religion.

The Good News Club seeks only to end that affirmative discrimination. It does not ask for any special benefit or favored status. The Good News Club simply seeks equal treatment. As demonstrated below, a policy of equal—as opposed to special—treatment neither endorses nor establishes religion.

B. Eliminating Discrimination Against the Good News Club Does Not Amount to an On-Campus Release-Time Program.

Although Milford Central allows other clubs to use its facilities, it denies religious clubs access on equal terms. Eliminating that discrimination does not raise any of the concerns that led the Court to strike down the on-campus release-time program at issue in *McCollum*. The program in *McCollum* provided special benefits to religion and the participating religious groups. The Illinois schools excused students during school hours only if they took part in religious education provided by one of the participating religions. *See* 333 U.S. at 209-10. Students had no option to receive instruction from a non-religious outside group.

With the exception of the approved religions,[2] no other outside group received access to school facilities during school hours. Students' only choices were religious instruc-

[2] While there was no suggestion of an express denominational preference in *McCollum* and any religion could apply to participate, the local school superintendent would "determine whether or not it is practical for said group to teach in said school system." *Id.* at 208 n.3 (quotation omitted).

tion and normal school instruction, with the caveat that the normal school instruction could not involve "courses or activities of compelling interest or importance" that would deter students from choosing religion. *Id.* at 223 (Frankfurter, J., concurring) (describing release-time programs generally). Here, by contrast, the Good News Club seeks no special status for religious instruction. It seeks only to remove a special disability imposed on religious speech and religious speech alone.

In addition, the program at issue in *McCollum* involved a union of church and school functions with no analog in this case. First and foremost, religious instruction took place during school hours with the State's compulsory education laws ensuring student attendance. *See id.* at 209-10. To enforce those compulsory attendance laws, the religious instructors took attendance and reported absentees just like teachers of any other subject. *See id.* at 209 & n.5. Although the school did not pay the salary of the religious instructors, the superintendent approved each and every instructor. *See id.* at 208 & n.3 (noting that "[t]he superintendent was the last word so far as the individual was concerned"). More broadly, the religious instruction took place "subject to the approval and supervision of the Superintendent." *Id.* at 226 (Frankfurter, J., concurring) (quotation omitted). In light of this record, the Court had little difficulty striking down the Illinois program and distinguishing other release-time programs where religious instruction was not "patently woven into the working scheme of the school," *id.* at 227 (Frankfurter, J., concurring). *Cf. Zorach*, *supra* (approving New York's release-time program).

Although Milford Central admits, as it must, that the Good News Club does not seek to meet during school hours or to use the power of the state to enforce attendance, Milford Central attempts to minimize these key differences. Instead,

Milford Central suggests that the proximity of the meeting time to the end of the school day somehow raises constitutional concerns. Opp. Cert. at 9. However, *McCollum* emphasized the unique problems raised by in-school meetings during the school day, while this Court subsequently has approved after-school meetings.

First, the fact that the program in *McCollum* took place during the school day, when state law forces students to stay in school, was central to both the efficacy of the program and the Court's decision to strike it down. The Court focused on the fact that "[p]upils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes." *McCollum*, 333 U.S. at 209-10. Moreover, as Justice Frankfurter explained, proponents of release-time programs believed that providing religious instruction during the normal school day was critical to the program's success. After-school programs failed because "children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his 'business hours.'" *Id.* at 222 (Frankfurter, J., concurring).

At the same time, this Court has never expressed any concern with allowing religious groups to participate on a truly equal basis outside of school hours. For example, in *Mergens*, the Court confronted a program that allowed student groups to meet "after school hours on school premises." 496 U.S. at 231 (plurality). The Court expressed no concern with allowing a Bible club to meet after school on equal terms with the other student clubs. The Court specifically rejected the argument that the after-school meetings were constitutionally problematic because "the State's compulsory attendance laws bring the students

together." *Id.* at 249. Instead, the Court focused on the statute's requirement that meetings occur during "noninstructional time," and concluded that this provision "avoids the proble[m] of . . . 'mandatory attendance requirements.'" *Id.* at 251 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987)).[3]

In the end, Milford Central's effort to rely on *McCollum* fails because this Court long ago rejected any bright-line rule against the use of school facilities by religious groups. *Lamb's Chapel* and *Mergens* both make clear that a nondiscriminatory policy of access to school facilities does not raise the same concerns as an on-campus release-time program. Just last Term, this Court reaffirmed that "by no means" does the Establishment Clause "impose a prohibition on all religious activity in our public schools." *Santa Fe*, 120 S. Ct. at 2281.

School facilities do not bear some indelible taint of state endorsement that continues after normal school hours and attaches to private speech as well as government speech. If the school allows groups to participate on an equal basis and does not exert control over the content of private speech, the fact that religious speech occurs within the school's walls does not suffice to violate the Establishment Clause. Under these circumstances, there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Lamb's Chapel*, 508 U.S. at 395; *accord Mergens*, 496 U.S. at 250 (plurality)

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[3] If Milford Central truly were concerned about the unique dangers of meetings that take place immediately after the school day, it would have limited its prohibition on religious meetings to that time period. Instead, Milford Central imposed a blanket ban on all religious meetings at any time, night or day. This fact betrays Milford Central's protestations about meetings immediately after the school day as a litigating position, rather than a legitimate concern.

(concluding that students "are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

Finally, it bears emphasis that although both *Lamb's Chapel* and *Mergens* suffice to distinguish *McCollum*, this case more closely resembles *Lamb's Chapel*. First, and most obviously, the restrictions on religious expression are virtually identical. This case, like *Lamb's Chapel*, arises out of a New York school district's adoption of a policy based on § 414 of the New York State Education Law. Both of the challenged school policies expressly discriminated against the use of school facilities for religious purposes. Second, like *Lamb's Chapel*, this case involves outside community groups—like the Boy Scouts and Girl Scouts—seeking access to school facilities, not school-sponsored groups as in *Mergens*. Accordingly, the Equal Access Act and the statutory analysis under the Act do not apply.

Equally important, the participation of outside community groups, rather than school-sponsored student groups, further reduces any risk of perceived endorsement. The "principal contention" raised against the Equal Access Act in *Mergens* was that "the student religious meetings are held under school aegis." *Mergens*, 496 U.S. at 249. Although *Mergens* ultimately rejected this objection, it addressed it at length. Here, by contrast, as in *Lamb's Chapel*, there is no school-sponsored club and, accordingly, far less risk of endorsement. Outside community groups involve a reduced risk of endorsement precisely because they are outside groups coming from the community rather than from the school itself. A meeting of the Boy Scouts or the Good News Club does not become a school function just because the meeting is held at school. The Court said as much in *Lamb's Chapel*. A State does not establish religion simply by allowing a religious group to meet on school premises on a non-discriminatory basis.

C. Eliminating Discrimination Against the Good News Club Does Not Amount to Authorizing School Prayer.

Milford Central's suggested analogy between allowing the Club to participate on an equal basis and authorizing official school prayers is even more strained. Allowing religious speech on a neutral basis does not raise the constitutional concerns implicated by having the state compose or impose official school prayers. This Court consistently has emphasized "the critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250); *accord Santa Fe*, 120 S. Ct. at 2275 (reaffirming the importance of this distinction).

In all its school prayer cases, this Court has emphasized how government control over content made the resulting prayers impermissible religious speech by the government. *See, e.g., Santa Fe*, 120 S. Ct. at 2275; *Lee*, 505 U.S. at 590 (concluding that the "degree of school involvement" made clear that the "prayers bore the imprint of the State"); *Engel*, 370 U.S. at 425 (concluding that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government"). The Court made this point clearly last Term in *Santa Fe*. There, the Court reaffirmed the critical distinction between private and government speech, and analyzed the record at length to determine whether the speech at issue was properly attributed to the government. *See* 120 S. Ct. at 2275-79. The clear implication of the Court's analysis is that if the Court had construed the speech as truly private speech, it would have upheld the program. *See, e.g., id.* at 2275 (reaffirming that "an

individual's contribution to a government-created forum was not government speech").

Santa Fe recognizes that when the government exercises substantial control over topic and content and thereby favors prayer, the fact that a private speaker selects the exact words will not necessarily save the program.[4] Here, however, the school would not control the private speakers' content merely by giving the Good News Club equal access to a government forum.

Indeed, the government would relinquish, rather than exercise, content censorship by allowing the Club to use school facilities on a non-discriminatory basis. Currently, the government affirmatively prevents groups from engaging in religious speech and from meeting for religious purposes. This policy necessitates continuing government monitoring to ensure that meetings are not convened for illicit purposes and discussions do not stray into forbidden territory. By permitting religious speech on a non-discriminatory basis, Milford Central would relinquish its control over topic, which would obviate this problematic monitoring of content and viewpoint. Doing so would not raise any constitutional problems. As this Court explained in *Rosenberger*, *Lamb's Chapel*, and *Mergens*, programs that permit private speech on a neutral basis do not raise Establishment Clause concerns.

[4] Of course, the Court also found troubling other aspects of the school's program—aspects with no analog in this case, such as the school's historical practice of maintaining a student chaplain and the unusual majoritarian election system. All of these factors led the Court to conclude that "prayer is, in actuality, encouraged by the school." *Id.* at 2278. The facts of this case, especially the school's discrimination *against* the Good News Club, stand in stark contrast.

III. THE FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION CLAUSES ALL PREVENT OVERT DISCRIMINATION AGAINST RELIGION AND OBVIATE ANY NEED FOR ARBITRARY AND UNWORKABLE DISTINCTIONS BETWEEN RELIGION AND RELIGIOUS SPEECH ON A SECULAR TOPIC

As explained above, nothing in this Court's Establishment Clause jurisprudence prevents Milford Central from allowing the Good News Club to use school facilities on a non-discriminatory basis. Indeed, far from requiring facial discrimination against meetings convened "for religious purposes," the Establishment, Free Exercise, and Equal Protection Clauses all affirmatively prevent it. Accordingly, Milford Central's effort to justify discrimination against religion as a valid content restriction on a limited public forum cannot succeed. There is no need for this Court to struggle to draw arbitrary distinctions between discrimination against religion as opposed to discrimination against religious viewpoints. The former violates the Establishment, Free Exercise, and Equal Protection Clauses, just as surely as the latter violates the Free Speech Clause.

A. The Difference Between Discrimination Against Religion and Discrimination Against Religious Viewpoints Is Elusive at Best.

In defending against the Club's free speech challenge, both Milford Central and the court below characterize Milford Central's discrimination against religion as a valid content restriction on speech in a limited public forum. While acknowledging—as it must in light of *Lamb's Chapel* and *Rosenberger*—that the Free Speech Clause forbids discrimination against religious viewpoints, Milford Central insists that a prohibition on religion is a valid content or topic limitation. Likewise, the court below emphasized that

no other group engages in "the type of religious instruction and prayer provided by the Club. Accordingly, the Milford School's decision to exclude the Good News Club from its facilities was based on content, not viewpoint." Pet. App. at A18.

This Court repeatedly has stressed that the Free Speech Clause forbids discrimination against religious viewpoints and religious perspectives, even when the speech occurs in a limited public forum. *See, e.g., Lamb's Chapel, supra*; *Rosenberger, supra*. In *Lamb's Chapel*, the Court found that the school had engaged in impermissible viewpoint discrimination when it denied the showing of a film on school property "solely because the series dealt with the subject from a religious standpoint." 508 U.S. at 394. The Court elaborated in *Rosenberger* that "discriminating against religious speech [is] discriminating on the basis of viewpoint," and that more generally, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." 515 U.S. at 832, 829.

In both *Lamb's Chapel* and *Rosenberger*, the government attempted to defend its restrictions on the use of its facilities by religious groups as valid content-based restrictions on the subject matter of religion. The government in both cases relied on precedents suggesting that schools can impose reasonable restrictions on a limited public forum that exclude the discussion of designated topics. *See, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985).[5] In both cases, this Court rejected that argument and

[5] Of course, the government does not enjoy plenary authority to impose restrictions on a limited public forum. Such a restriction "*may* be permissible *if* it preserves the purposes of that limited forum," *Rosenberger*, 515 U.S. at 830, and must be "'reasonable in light of the purpose served by the forum,'" *id.* at 829 (quoting *Cornelius*, 473 U.S. at 806) (emphasis added). *See also Denver Area Educ. Telecom. Consortium v. FCC*, 518 U.S. 727, 750 (1996) (plurality) (reserving the question whether strict scrutiny applies to a content restriction defining the boundary of a limited public forum).

concluded that efforts to exclude religious groups constituted impermissible viewpoint discrimination. As explained in more detail in Petitioners' brief, Milford Central's exclusion of the Good News Club likewise constitutes impermissible viewpoint discrimination by limiting speech based on its "specific motivating ideology," *Rosenberger*, 515 U.S. at 829. However, as explained below, the Court need not definitely resolve whether Milford Central has discriminated on the basis of content or viewpoint to resolve this case.

The task of distinguishing between restrictions on religion as a subject and restrictions on speech from a religious perspective is difficult, if not ultimately impossible. In *Rosenberger*, the Court "acknowledged" that "the distinction is not a precise one." 515 U.S. at 831. "It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought." *Id.* The dissenting judge below made an even stronger point in the specific context of moral instruction: "when the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." Pet. App. at A22 (Jacobs, J., dissenting). Indeed, having the constitutionality of school policies turn on murky distinctions between religion as a viewpoint and religion as a topic forces the courts to make inquiries into religion, which they generally prefer to avoid.

The Court made a similar point in *Widmar v. Vincent*, 454 U.S. 263 (1981). There, the Court rejected the dissent's proposed distinction between religious speech and religious worship as lacking "intelligible content." *Id.* at 269 n.6. Equally important, the Court observed that "even if the

distinction drew an arguably principled line; it is highly doubtful that it would lie within the judicial competence to administer." *Id.*; *see also Rosenberger*, 515 U.S. at 835-36; *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings."). "Merely to draw the distinction would require the [school]—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith." *Widmar*, 454 U.S. at 269 n.6. This Court long has wisely abjured such inquiries. Enforcing the distinction between religious speech and religious worship "would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*

Despite these admonitions, the court below placed dispositive significance on a supposed distinction between religious speech and the practice of religion, and confidently asserted its ability to police that line. The court reiterated its belief that the school could prohibit prayer or religious instruction, as long as it did not discriminate against religious viewpoints in the discussion of a secular topic. The court then confidently proclaimed that "it is not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer." Pet. App. at A16 (citation omitted). Finally, the court "determined that the activities of the Club fall clearly on the side of religious instruction and prayer," and that "the Good News Club goes far beyond merely stating its viewpoint." *Id.* at A16-A17.

This analysis rests on twin fallacies. First, it ignores *Widmar* and erroneously asserts a competence to distinguish religious instruction and prayer from religious speech. Second, the court's reasoning relies on the equally flawed

premise that a statute that expressly discriminates against religious instruction and prayer constitutes a permissible content-based restriction on a public forum. The Establishment, Free Exercise, and Equal Protection Clauses clearly forbid such facial discrimination against religion.

B. The Establishment, Free Exercise, and Equal Protection Clauses Prohibit Facial Discrimination Against Religion.

This Court has long recognized that a core protection of the Establishment, Free Exercise, and Equal Protection Clauses is the prohibition of discrimination against religion or between sects. Although the Court at various times has relied on one constitutional provision rather than another, the Court consistently has treated these Clauses as embodying a non-discrimination principle. Most of the Court's cases have addressed the more difficult situation where a state policy is neutral on its face but has a disproportionate impact on religion generally or on a particular religious group. This case involves the straightforward case of express facial discrimination against religion.

The Court relied on this non-discrimination principle in striking down a statute that expressly prohibited ministers or priests from serving in the state legislature. *See McDaniel v. Paty*, 435 U.S. 618 (1978). Although *McDaniel* produced no opinion for the Court, the Court unanimously rejected the express disqualification under various legal theories. Chief Justice Burger and Justice Stewart decided the case under the Free Exercise Clause, while Justice White applied the Equal Protection Clause. Justice Brennan located the constitutional prohibition on such express discrimination in the Establishment and Free Exercise Clauses. He found the provision unconstitutional because "it establishes a religious classification—involvement in protected religious activity—governing . . . eligibility." *Id.* at 632 (Brennan, J., concurring).

More broadly, Justice Brennan concluded that with the exception of express accommodations of religion, *see, e.g., Zorach, supra*; *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338-39 (1987), the government may not make express classifications on the basis of religion. "Beyond these limited situations in which government may take cognizance of religion for purposes of accommodating our traditions of religious liberty, government may not use religion as a basis for the imposition of duties, penalties, privileges or benefits." 435 U.S. at 639 (Brennan, J., concurring). Justice Brennan's analysis reflects a broader principle that the Court has long recognized in its Establishment Clause jurisprudence: "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). As Justice Kennedy explained more recently, "the Establishment Clause forbids the government to use religion as a line-drawing criterion." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring); *see also id.* at 699-704 & n.6 (plurality) (finding statute unconstitutional because it reflected "legislative favoritism along religious lines" and "employed a religious criterion for delegating political power"); *id.* at 716 (O'Connor, J., concurring) (reaching the same result in part because "it seems proper to treat [the district] as a legislatively drawn religious classification").

The Court recognized a similar non-discrimination principle reflected in the Free Exercise Clause in *Employment Div. v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Smith* observed that the Free Exercise Clause makes clear that the government may not "impose special disabilities on the basis of religious views or religious status." 494 U.S. at 877. The Court concluded that "[i]t

would doubtless be unconstitutional" for a statute to ban "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* Indeed, *Smith* noted that statutes that expressly discriminate on the basis of religion raise concerns similar to race-based classifications. "Just as we subject to the most exacting scrutiny laws that make classifications based on race or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Id.* at 886 n.3 (citations omitted).

In *Lukumi*, the Court went further and recognized that the Free Exercise Clause prohibits discrimination against religion even where the discrimination is not clear on the face of the statute. The Court reiterated that "the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons*." 508 U.S. at 532 (emphasis added). *Lukumi* reaffirmed that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. The Court went on to hold that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534. Applying that test, the Court struck down a statute forbidding animal sacrifices despite the absence of any language expressly addressing the religious nature of the practice. *See id.* at 535-40.

Lukumi recognized that the Equal Protection Clause provides similar protections against discrimination on the basis of religion. The Court drew on its equal protection jurisprudence for support and noted that, in analyzing a statute, the determination concerning "'[n]eutrality in its application requires an equal protection mode of analysis.'" *Id.* at 540 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The Court

repeatedly has grouped religion with race as a forbidden basis for government action under the Equal Protection Clause. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (applying rational basis review because the government did not "classify along suspect lines like race or religion"); *American Sugar Ref. Co. v. Louisiana*, 179 U.S. 89, 92 (1900); *see also Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) (upholding "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments").

Likewise, the Court employed an equal protection mode of analysis in striking down limitations on charitable solicitations in *Larson v. Valente*, 456 U.S. 228 (1982). *See id.* at 246 (concluding that "we treat the law as suspect and . . . we apply strict scrutiny in adjudging its constitutionality"); *accord Smith*, 494 U.S. at 886 n.3.[6] As Justice Kennedy summarized in *Kiryas Joel*, "the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account

[6] Although *Larson* viewed the statute as involving a denominational preference because its burdens fell disproportionately on less well-established churches, subsequent cases have cited it for the proposition that the Constitution forbids discrimination between religious sects and between religion and non-religion. *See, e.g., Kiryas Joel*, 512 U.S. at 705; *see also id.* at 703 (noting "that government should not prefer one religion to another, or religion to irreligion"). Of course, if (contrary to fact) Milford Central's policy imposed religion-neutral burdens, it might involve the same type of denominational preference at issue in *Larson* because the burdens might well have greater impact on less well-established churches that do not have their own facilities or cannot afford to bus children to other locations. However, the statute's facial discrimination against all religion obviates any difficult inquiry into whether it creates a denominational preference through its disproportionate impact.

of their race, so too it may not segregate on the basis of religion." 512 U.S. at 728.

In short, "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Id.* at 715 (O'Connor, J., concurring). Unlike the more difficult question posed by facially-neutral statutes, this case involves the relatively rare (and relatively easy) case of a law that facially discriminates against religion. To borrow a phrase, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Notwithstanding Milford Central's decision to open the school for a variety of "social, civic and recreational meetings and entertainment events," its policy expressly states that "[s]chool premises shall not be used by any individual or organization for religious purposes." Pet. App. at A3 (quoting school policy). As the court below accurately summarized, "[t]he Policy expressly forecloses use for religious purposes." *Id.*

This express discrimination against religion cannot be squared with the Establishment, Free Exercise, and Equal Protection Clauses. The Policy discriminates against religion on its face. By expressly denying access for religious instruction and worship, Milford Central imposes an unlawful "religious classification," *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring), and engages in impermissible "[o]fficial action that targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534.

Indeed, this policy goes beyond discrimination against religion to discriminate on the basis of religious motivation. By the policy's plain terms, an otherwise permissible social,

civic, or recreational meeting is forbidden if it is convened "for religious purposes." Under the policy, "it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions." *Id.* at 547. The local cooking club can meet and break bread as long as those actions are devoid of religious motivation. This discrimination is flatly unconstitutional. The government cannot constitutionally prohibit meetings "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. This express discrimination violates the Constitution's commitment to religious tolerance.

C. An Express Prohibition on the Use of Facilities for Religious Purposes Is Not a Valid Content-Based Restriction.

The centerpiece of Milford Central's litigation strategy has been to characterize its policy as a content-based restriction that prohibits religious instruction or any discussion "for religious purposes," as opposed to a prohibition against addressing secular topics from a religious viewpoint. Indeed, before the litigation commenced, "Superintendent McGruder and counsel determined that 'the kinds of activities proposed to be engaged in by the Good News Club [a]re not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself.'" Pet. App. at A10 (quoting Milford Central's initial determination). The court below drew the same distinction in approving Milford Central's exclusion of the Good News Club. *See id.* at A16-A18.

The position of Milford Central and the court below proceeds from the fundamentally mistaken notion that the government can define the boundaries of a limited public forum along expressly religious lines. Of course, Milford

Central goes beyond merely prohibiting speech on a religious topic to take the clearly forbidden step of prohibiting speech "because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. But even putting that objection to one side, the Establishment, Free Exercise, and Equal Protection Clauses all forbid the government from using religion as a basis for determining whether a private speaker's message is permitted or *verboten*. Accordingly, Milford Central's effort to avoid the viewpoint discrimination label this Court applied in *Lamb's Chapel* and *Rosenberger* serves only to indict the school for violating the non-discrimination principle of the Establishment, Free Exercise, and Equal Protection Clauses.

Milford Central and the court below seem to think that Milford Central's ability to define the boundaries of its limited public forum somehow excuses it from compliance with the Establishment, Free Exercise, and Equal Protection Clauses. For example, in an earlier case, the court below concluded that the Constitution's prohibition on facial discrimination against religion only "pertain[s] to traditional public forums, or to a limited forum where the 'viewpoint neutral' rule has been violated." *Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 216 (2d Cir. 1997). That is simply not so.

This Court's public forum cases do not trump the commands of the Establishment, Free Exercise, and Equal Protection Clauses. To be sure, the government generally may make topical distinctions in drawing the boundaries of a limited public forum provided they are reasonably related to the purposes of the forum. *See, e.g., Rosenberger*, 515 U.S. at 829-30; *Cornelius*, 473 U.S. at 806. But that authority does not extend to drawing those boundaries on the basis of forbidden classifications, like race or religion. *See, e.g., Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[T]he Establishment Clause forbids the government to use

religion as a line-drawing criterion."). There are few functions where the government enjoys as much discretion as in deciding whom to prosecute. Nonetheless, this Court had little difficulty concluding that the government's exercise of prosecutorial discretion "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Armstrong*, 517 U.S. at 464 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

The government also enjoys substantial latitude in drawing political districts, but this Court forbids racial and religious gerrymandering. *See, e.g., Kiryas Joel, supra.* There is simply no justification for using race or religion to set the boundaries of a limited public forum, a context in which the government enjoys substantially less discretion.[7] Indeed, the government cannot draw racial or religious lines even in a non-public forum. For example, it cannot criminalize trespass on jailhouse grounds "for religious purposes," or obstruction of military bases by Asian-Americans. If the government must respect the non-discrimination principle in the non-public forum context (and, more generally, in enacting all criminal statutes, *see Smith, supra*), a restriction on speech in a limited public forum must respect this same principle, *a fortiori*.

This is not to say that Milford Central is powerless to place any restrictions on its forum. Milford Central clearly could close its schools to all outside groups. Likewise, it might impose content-based restrictions on permissible

[7] It bears emphasis that this Court's precedents require the boundaries of a limited public forum to be not only viewpoint-neutral, but reasonable as well. *See, e.g., Lamb's Chapel*, 508 U.S. at 392-93; *Cornelius*, 473 U.S. at 806. A limited public forum drawn along racial or religious lines is unreasonable per se. A religious classification, no less than a racial one, "is not reasonably related to any legitimate legislative objective." *Ray v. Blair*, 343 U.S. 214, 226 n.14 (1952).

speech, as long as it does not use forbidden classifications—such as race and religion—in drawing the boundaries. *See, e.g., Armstrong*, 517 U.S. at 464; *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial."). A municipality can declare an area of a school or park off-limits for groups of greater than 20 people and all sporting events. The neutral prohibition on gatherings in excess of 20 people may well have the effect of limiting the park's use for religious exercises without raising constitutional difficulties. However, if the municipality expressly adds religious services to the list of forbidden uses, it crosses a constitutional line. The Constitution simply forbids the government from using religion as a criterion for determining who will have access to a limited public forum.

The Constitution leaves Milford Central with substantial latitude in fixing the boundaries of its limited public forum. If Milford Central has legitimate reasons for limiting groups that raise particular problems, it should have no difficulty fashioning those restrictions in religion-neutral terms. But that is a discipline the Constitution imposes on the school. *See, e.g., Lukumi*, 508 U.S. at 546. Milford Central cannot take a short cut by expressly discriminating against religion or religious groups. The Constitution protects against the "inequality [that] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43. If there is some other characteristic of the Club that concerns school officials, they remain free to target that concern directly. Facial discrimination against religion is not an option.

CONCLUSION

For the foregoing reasons, and those expressed in Petitioners' Brief, this Court should reverse the judgment below.

Respectfully submitted,

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No. 99-2036

IN THE

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GOOD NEWS CLUB, *et al*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMICI CURIAE THE NORTHSTAR LEGAL CENTER AND BRONX HOUSEHOLD OF FAITH IN SUPPORT OF PETITIONERS

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No. 99-2036

GOOD NEWS CLUB, et al,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

INTEREST OF AMICI

Amici have directly experienced the Second Circuit's repeated refusals to enforce the First Amendment and protect private religious expression in the public forums at New York public schools.[1] The Northstar Legal Center represented the Bronx Household of Faith, a church located in New York City, when public school officials refused to rent building space to them for religious meetings, although New York Education Law § 414 opened the schools generally for expressive activities. *Bronx Household of Faith v. Community School*

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The Alliance Defense Fund of Scottsdale, Arizona, has contributed to the cost of producing this brief. Both parties have consented to the filing of this brief and the letters of consent are on file with the Clerk's Office.

District No. 10, 127 F.3d 207 (2d Cir. 1997), *cert. den.* 523 U.S. 1074 (1998). Counsel for the Northstar Legal Center also served as co-counsel representing Lamb's Chapel Church before this Court in *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993). Counsel also helped litigate an earlier case before the Second Circuit involving essentially the same legal issues raised here, *Travis v. Owego-Apalachin School District*, 927 F.2d 688 (2d Cir. 1991).

Amici write this brief to point out the Second Circuit's persistent deviation from this Court's equal access rulings prohibiting content-based discrimination against religious expression, found in *Widmar v. Vincent*, 454 U.S. 263 (1981) and other cases. Churches like Bronx Household of Faith have suffered because the Second Circuit has not enforced the First Amendment to protect religious expression in the public forums formed in New York public schools by New York Education Law § 414. The amici urge this Court to strongly reverse the Second Circuit's aberrant position on equal access and reaffirm that the First Amendment prohibits the government from excluding religious expression from a forum generally open to the public.

SUMMARY OF ARGUMENT

The decision in this case represents the latest example of the Second Circuit's resistance to protecting religious speakers from content-based exclusion in public forums, as this Court did in the landmark decision of *Widmar v. Vincent*, 454 U.S. 263 (1981). Although the amici supports the arguments by petitioner Good News Club that the school district engaged in unconstitutional viewpoint discrimination in violation of *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), this case fundamentally is one of content-based discrimination in violation of *Widmar*. This Court should rule

that the school district here engaged in content-based discrimination against a religious speaker in a public forum created by New York Education Law §414.

The Second Circuit has on at least four occasions in recent years upheld religious exclusion policies that clearly conflict with *Widmar*. *See, e.g.,Lamb's Chapel v Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992); *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997); *Full Gospel Tabernacle v. Community School District #27*, 164 F.3d 829 (2d Cir. 1999) and the case now before this Court. The Second Circuit's misapplication of equal access precedent are legion:

- The Second Circuit has evaded the clear holding of *Widmar* by refusing to recognize that New York Education Law §414 creates a public forum in the state's public schools. Instead, it has distorted the limited forum doctrine to permit public schools to exclude community groups that engage in religious expression from the school buildings by ruling that any exclusion from a forum makes it a "limited forum," no matter how many other speakers or forms of expression the government permits. The Second Circuit's faulty reasoning drains *Widmar* of most protection for religious expression.

- The Second Circuit has openly rejected this Court's mild rebuke in *Lamb's Chapel* that it was misapplying *Widmar* and the limited forum doctrine to justify content-based discrimination by New York public schools against religious speakers.

- The Second Circuit has improperly narrowed the holding of *Lamb's Chapel* to mean that the First Amendment protects only religious "speech" but not religious "worship," even though this Court expressly rejected such a dichotomy in

Widmar.

- The Second Circuit has justified its decisions to exclude religious expression from New York public school forums by relying on an obsolete, pre-*Widmar* decision by a state intermediate appellate court that New York Education Law § 414 requires public schools to deny access to the forum by religious speakers. Yet the state appellate court in *Trietley v. Board of Ed. of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (App. Div. 1978) based its anti-religious interpretation of New York Education Law § 414 on a faulty understanding of the Establishment Clause that this Court rejected in *Board of Education v. Mergens*, 496 U.S. 226 (1990). This Court should rule that the case now before this Court is one of unconstitutional content-based discrimination against religious expression in a public forum, in violation of *Widmar*.

I.

THE SECOND CIRCUIT HAS REPEATEDLY RESISTED APPLYING THIS COURT'S EQUAL ACCESS PRINCIPLES TO PROTECT RELIGIOUS EXPRESSION FROM CONTENT-BASED EXCLUSIONS IN PUBLIC FORUMS.

A. New York Education Law § 414 Creates A Public Forum In New York Public Schools.

This Court should not accept the Second Circuit's erroneous conclusion that New York Education Law §414 creates a "limited public forum" in the state's public schools. In light of *Widmar* and other case, the state law clearly creates a public forum.

Public schools may become public forums for use by the community "if school authorities have 'by policy or practice' opened those facilities for 'indiscriminate use by the general public,' ... or by some segment of the public, such as student organizations." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988), quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983).

New York Education Law §414 provides that community residents may use public school facilities for "social, civic and recreational meetings, entertainment events and other uses pertaining to the welfare of the community," *Good News Club v. Milford Central School*, 202 F.3d 502, 504 (2d Cir. 2000). The statute also permits community groups to use public schools for instruction, political meetings, civic forums and community centers. *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 386 (2d Cir. 1992). Although the state law creates a forum broadly available to the community, the Second Circuit concluded, as it has in earlier cases, that the state law creates only a limited forum. *Good News Club*, 202 F.3d at 508; *Bronx Household of Faith*, 127 F.3d at 215 and *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 680 (2d Cir. 1988). Yet this conclusion conflicts with this Court's ruling in *Widmar* and the rulings of virtually every other circuit that has addressed the question of what policies create public forums.

This Court ruled in *Widmar* that the University of Missouri-Kansas City had created a public forum for students by policy. 454 U.S. at 267. The policy in *Widmar* permitted meetings for "political, cultural, educational, social and recreational events," *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980), which is similar to the language of New York Education Law § 414 that creates the forum at issue in this case. This Court and the Eighth Circuit ruled that the

University of Missouri had created a public forum with an unconstitutional content-based exclusion of religious worship.

Other circuits have ruled that policies similar to the one in *Widmar* and the one in this case create public forums, not limited forums. The First Circuit ruled in *Grace Bible Fellowship v. Maine School Administrative District No. 5*, 941 F.2d 45 (1st Cir. 1991), that a Maine school district had created a public forum when it opened its buildings for meetings by youth groups, community, civic and service organizations, government agencies, educational programs, and cultural events.[2] A school district in Maine rejected a local church's request to rent the high school for an evangelistic outreach that would have included a free Christmas meal and preaching on the true meaning of Christmas because of the event's religious preaching and prayer. The First Circuit ruled that the school district violated the church's First Amendment rights with its policy prohibiting community groups from leasing school facilities "for the direct advancement of religion," calling the school district's actions "censorship," 941 F.2d at 48, and an "elementary violation" of the First Amendment. *Id.*

The Third Circuit ruled in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3rd Cir. 1990), that a suburban Philadelphia school district had created a public forum when it permitted meetings by civic groups, cultural activities, resident service organizations, adult education classes and labor unions. 907 F.2d at 1372-73, 1378-79. The Third Circuit ruled that the school district violated the First Amendment rights of Campus Crusade for Christ when it refused to rent its high school auditorium for a Saturday night evangelistic performance by

[2] The text of the Maine school district's policy does not appear in the First Circuit's opinion, but it was in the record before that Court and is taken from the Brief of Appellees, pps 9-10.

Andre Kole, an evangelist who performs an illusionist show as a vehicle to preach a Christian gospel message to the audience. The Third Circuit declared unconstitutional a policy which prohibited community groups from using school facilities "for religious services, instruction and/or religious activities."

The Fourth Circuit ruled in *Fairfax Covenant Church v. Fairfax County School Bd.*, 17 F.3d 703 (4th Cir. 1994), that a school district had created a public forum by its policy permitting meetings by cultural, civic and educational groups, as well as political organizations. The Fourth Circuit struck down the school district's policy that required churches to pay more than nonreligious groups to rent school buildings.

The Fifth Circuit ruled in *Concerned Women for America v. Lafayette County and Oxford, Mississippi Public Library*, 883 F.2d 32 (5th Cir. 1989), that a public library had established a public forum with its policy permitting meetings of a "civic, cultural or educational character." 883 F.2d at 33-34. The library's policy also expressly excluded religious expression. The Fifth Circuit found the religious exclusion violated the First Amendment when it excluded a woman's prayer group from meeting in the library's auditorium for a group prayer meeting. 883 F.2d at 34.

When this Court and five other circuit courts have faced policies creating forums for speech like the one created by New York Education Law § 414, they have consistently found them to be public forums, not limited forums. This Court should do the same here, so that the school district's exclusion of the Good News Club from the public forum will trigger strict scrutiny by this Court. "Where the State has opened a forum for direct citizen involvement, exclusions bear a heavy burden of justification," *Widmar v. Vincent*, 454 U.S. at 268.

B. The Second Circuit Has Erred By Ruling That New York Education Law §414 Creates Only A Limited Forum.

The Second Circuit has erred by ruling that even one exclusion from a forum generally open to all transforms it into a limited forum. The error started in *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676 (2d Cir. 1988) when the Second Circuit ruled that *Widmar* applied only to public universities and that public schools were not traditionally viewed as public forums. 852 F.2d at 679. Therefore, public schools must be limited forums because they exclude some speakers. "Under the limited forum analysis, property remains a nonpublic forum as to all unspecified uses." *Id.* The Second Circuit has refused repeated requests in later lawsuits to alter this conclusion that New York Education Law §414 creates only a limited forum. *See, e.g., Lamb's Chapel*, 959 F.2d at 381 and *Bronx Household of Faith*, 127 F.3d at 212-14.[3]

However, this Court has never agreed with the Second

[3] The Second Circuit's strange equal access rulings contain a bizarre twist that permits religious expression to meet in a public school forum (even though it is allegedly forbidden by N.Y. Education Law § 414) if the school district had allowed religious groups to use the school facilities in the past, even inadvertently. *See, e.g., Deeper Life*, 852 F.2d at 680 and *Travis*, 927 F.2d at 693. Because of this "error with tenure" corollary, Second Circuit equal access cases frequently degenerate into arguments about whether a Gospel singing concert or a New Age lecture were sufficiently religious to permit more straightforward religious expression, too. *Lamb's Chapel*, 959 F.2d at 387-88. Interestingly, the Second Circuit now has spelled out a process by which school districts can "wash away" the taint of permitting a religious group to meet in the past, so the school district can once again ban all religious expression from its forum. *See Full Gospel Tabernacle v. Community School District #27*, 979 F.Supp. 214, 217-18 (E.D.N.Y. 1997), *aff'd*, 164 F.3d 829 (2d Cir. 1999).

Circuit that a forum that allows a wide spectrum of speech is really only a limited forum if it excludes one thing, like religious expression. In fact, the Second Circuit reverses the proper constitutional analysis that this Court used in Widmar, Perry and other cases -- first, look to see whether the government opens the forum generally for speakers, in order to determine the constitutionality of any exclusion .

Any forum, open or limited, can exclude religious worship and instruction. However, to determine whether the exclusion is constitutional, a court must first determine what kind of forum it is, which means it must look to see whom the policy includes.

If the government permits the community generally to meet there for expressive activities, then it is a public or open forum, and the government must justify its religious exclusion by showing a compelling state interest. *Perry*, 460 U.S. at 45 and *Widmar*, 454 U.S. at 270.

A limited forum is different. This Court stated that if the forum allows only a specific group of people (like students) or a specific subject matter (like school board business) in the forum, then it is a limited forum. *Perry*, 460 U.S. at 45 n.7.

The Constitution treats exclusions from a limited forum more leniently than exclusions from a public forum. They only have to be reasonable. "Control over access to a non-public forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 806 (1985).

Therefore, one must first look at who is <u>included</u> in the

forum and determine whether it is a public forum "generally open to the public" or a limited forum. Once it has been determined what kind of forum it is, then a court can judge the constitutionality of the exclusions. Simply because a forum excludes a type of speech does not indicate whether the forum is public or limited.

The Second Circuit inverts this process and finds that the existence of even one exclusion makes the forum a limited one. The Second Circuit is flatly wrong when it rules that Education Law § 414 creates a limited forum because it excludes religious expression, even though it allows a broad array of speech like the forum did in *Widmar* and other cases. The Second Circuit's insidious twist on the public forum analysis gives government entities a way to gerrymander their forums to exclude disfavored speakers. If they allow everyone in the community to speak in the forum, except those with religious messages, then the forum is a "limited forum," where the exclusions only have to be reasonable, not compelling as *Widmar* requires. The Second Circuit's analysis nullifies the First Amendment protections found in *Widmar* and allows the government to discriminate against religious speakers.

If the Second Circuit's view of equal access law were correct, then religious groups could never prove a content-based exclusion. If a forum excludes religious speech, the school district can say it has a "limited forum," limited to everything but religious worship and instruction. In fact, under the Second Circuit's reasoning, this Court wrongly decided *Widmar*. The University in *Widmar* could have claimed that it really ran a "limited forum," based on subject matter. The limitation would have been, "all topics and subjects are permitted, except religious speech." This Court rightly rejected that cramped view of First Amendment protections against content-based exclusions from public forums.

This Court in *Mergens* warned against governmental manipulation of open forum terminology to exclude disfavored groups, which is exactly what the Second Circuit has approved:

> A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Mergens, 496 U.S. at 245. Therefore, the Second Circuit has contorted the equal access doctrines to claim that government may exclude religious speakers because the exclusion itself demonstrates that the forum is limited.

Oddly, the Second Circuit has understood equal access law correctly in other contexts not involving religious speech. In *New York Magazine v. Metropolitan Transit Authority*, 136 F.3d 123 (2d Cir. 1998), the Second Circuit agreed that one exclusion from a forum generally open to the pubic does not turn it into a limited forum:

> However, it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content. *See Cornelius*, 473 U.S. at 813-814, 105 S. Ct. at 3455 (Blackmun, J. dissenting).

> We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to designated public fora.

New York Magazine, 136 F.3d at 129. Here, the Second Circuit totally contradicts what it has said in *Deeper Life, Travis, Lamb's Chapel* and *Bronx Household of Faith* that one exclusion transforms a place into a limited forum, not a public forum with an unconstitutional content-based exclusion. This Court should emphatically reverse the Second Circuit incorrect rulings that end up denying speakers their right to equal access to a governmental forum merely because of the religious content of their speech.

C. The Second Circuit Has Rejected This Court's Statement in *Lamb's Chapel* That New York Education Law §414 Probably Creates A Public Forum.

This Court strongly indicated in *Lamb's Chapel* that the Second Circuit has erred with its rulings that N.Y. Education Law §414 (and a school district policy based on the law) creates only a limited forum and not a public forum.

> The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on District property were required to

> be justified by a compelling state interest and to be narrowly drawn to achieve that end (citations omitted). Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. **The argument has considerable force,** for the District's property is heavily used by a wide variety of private organizations .... We need not rule on this issue ....

Lamb's Chapel, 508 U.S. at 392 (emphasis added).

The Second Circuit rejected the "anvil-like hint" (*Bronx Household of Faith*, 127 F.3d at 212) dropped by this Court in *Lamb's Chapel* to the Second Circuit that it had erred. The Second Circuit refused to reverse its earlier rulings that N.Y. Education Law §414 creates only a limited forum, and continues to rule that way as it did in the case now before this Court. *Bronx Household of Faith*, 127 F.3d at 212-13 and *Good News Club,* 202 F.3d at 508-9.

This Court needs to deal strongly with the Second Circuit's defiance. This is not a situation in which the Second Circuit has made one aberrational decision that its judges will correct in some future case. The Second Circuit has repeatedly refused to apply this Court's equal access decisions in *Widmar, Mergens* and *Lamb's Chapel*, and has openly refused to "take the hint" this Court gave in *Lamb's Chapel* that New York law does indeed create an open forum with a content-based exclusion of religious speech. It is time for this Court to send a stronger message to the Second Circuit to follow the law by empathically reversing the decision below.

II.

THE SECOND CIRCUIT'S DECISION CREATES AN UNCONSTITUTIONAL DISTINCTION BETWEEN "RELIGIOUS SERVICES AND INSTRUCTION" AND "RELIGIOUS DISCUSSION"

The Second Circuit has wrongly construed *Lamb's Chapel* to protect only religious speech but not religious worship. See *Good News Club*, 202 F.3d at 510. Such reasoning clearly conflicts with *Widmar*, in which this Court rejected the argument that religious worship receives less protection under the First Amendment than religious speech:

> Here UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in **religious worship** and **discussion**. These are forms of speech and association protected by the First Amendment.

Widmar, 454 U.S. at 269 (emphasis added).

In *Widmar*, this Court devoted an extensive footnote explaining that religious worship and religious speech are both equally protected under the Free Speech Clause, giving three reasons. *See Widmar*, 454 U.S. at 269, n. 6.

The first reason this Court gave rejecting the distinction was that there is no intelligible way to distinguish between "religious speech" and "religious worship":

> There is no indication when "singing, hymns, reading scripture, and teaching biblical principles," *post* at 283, cease to be "singing, teaching and reading" -- all apparently forms of "speech," despite their religious subject matter -- and become unprotected "worship."

Widmar, 454 U.S. at 269, n. 6.

The second reason why this Court in *Widmar* refused to make a constitutional distinguish between "protected" religious speech and "unprotected" religious worship is that the government and courts would have to delve deeply into a religious group's affairs in violation of the Establishment Clause in order to make the distinction:

> Second, even if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer (citations omitted). Merely to draw the distinction would require the university -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases (citations omitted).

Widmar, 454 U.S. at 269, n. 6.

The third reason this Court gave in *Widmar* was that there is no good reason to protect "religious speech" only and not protect "religious worship" under the Constitution.

> Finally, the dissent fails to establish the *relevance* of the distinction on which it seeks to rely. The dissent apparently wishes to preserve

> the vitality of the Establishment Clause. *See, post* at 284-285. But it gives no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts, *see Heffron, supra*, than for religious worship by persons already converted. It is far from clear that the State gives greater support in the latter case than in the former.

Widmar, 454 U.S. at 269, n. 6.

This Court repeated this principle in its majority opinion of *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995):

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, *Heffron, supra*, at 647, **or even acts of worship**, *Widmar*, supra at 269, n. 6.

Pinette, 515 U.S. at 760 (emphasis added).

By upholding policies that protect religious speech but ban religious worship, the Second Circuit apparently thinks this Court ruled in *Lamb's Chapel* that the Constitution protects religious speech more than it does religious worship. But *Lamb's Chapel* in no way overruled *Widmar*. The decisions complement each other and are not in conflict. Although this Court resolved *Lamb's Chapel* on the basis of viewpoint discrimination, this Court did not intend for *Lamb's Chapel* to

nullify its earlier ruling in *Widmar* that the Free Speech Clause equally protects religious worship and religious speech. The Second Circuit needlessly pits *Lamb's Chapel* against *Widmar*, and creates confusion in this area of First Amendment jurisprudence. This Court should reverse the Second Circuit's false dichotomy of protected religious speech and less-protected religious worship.

III.

THE SECOND CIRCUIT BASES ITS DECISIONS ON AN OBSOLETE STATE INTERMEDIATE APPELLATE COURT DECISION

The Second Circuit has based its myriad misapplications of this Court's equal access decisions on the obsolete reasoning of a pre-*Widmar* state intermediate appellate court decision from New York, *Trietley v. Bd. of Ed. of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (App.Div. 1978). The Second Circuit relied on *Trietley* in its first major equal access case after *Widmar*, *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676 (2nd Cir. 1988), and has followed its deficient reasoning in subsequent cases. *Lamb's Chapel*, 959 F.2d at 387. *Trietley* has spurred persistent litigation over the application of this Court's equal access cases to New York Education Law §414 because of its erroneous interpretation of the First Amendment, especially the Establishment Clause.

Trietley involved high school students seeking permission to hold a student-led Bible study in the public high school. School officials refused to permit it, and the students sued, seeking access under the language of New York Education Law §414 and the First Amendment. The New York state court ruled against the students and rejected their First Amendment claims.

The court in *Trietley* reached the First Amendment issues mainly because the wording of Education Law §414 does not forbid religious worship or instruction. Because the case involved religious expression in a public school, the New York appellate court incorrectly assumed that the case should be resolved under the Establishment Clause case, not the Freedom of Speech Clause. That court concluded that permitting a student-led Bible study in a public school would violate the Establishment Clause. *Trietley*, 409 N.Y.S.2d at 916-17.

Three years later, this Court in *Widmar* ruled that equal access cases should be decided on the basis of freedom of speech, not the Establishment Clause basis that *Trietley* used. *Widmar*, 454 U.S. at 274. This Court again rejected those Establishment Clause arguments against equal access in *Bd. of Ed. v. Mergens*, 496 U.S. 226, 250 (1990). *Mergens* ruled that public schools could not ban meetings of student-led religious clubs.

That means that this Court has rejected *Trietley*'s Establishment Clause reasoning in *Widmar* and *Mergens*, and *Trietley*'s result in *Mergens*. In light of *Widmar* and *Mergens*, *Trietley* is no longer good law, because it converts Education Code §414 into a public forum with an unconstitutional content-based exclusion of religious worship and instruction.

This Court could abandon *Trietley* as the definitive interpretation of Education Law § 414 because it is not a decision by the highest court in New York, the Court of Appeals, but an opinion by one of the intermediate appellate courts. If this Court decides that it must continue to view *Trietley* as the definitive state court interpretation of New York Education Law §414, then this Court should declare New York

Education Law § 414 unconstitutional because of its content-based exclusions of religious speakers.

CONCLUSION

For the reasons expressed above, amici respectfully ask this Court to reverse the judgment of the Second Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF WALLBUILDERS, INC.
in support of the *Petitioner*

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INTEREST OF AMICUS[1]

Amicus curiae WallBuilders, Inc. is a 501c (3) organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that the relationship between government and its citizens is set on a sound constitutional basis in matters of religious liberty.

SUMMARY OF ARGUMENT

The Second Circuit's forum analysis in the instant case is fundamentally flawed. Through general confusion of forum terminology or through the Second circuits limited forum paradigm or through both, the Second Circuit generally applies and applied in this case the wrong standards to the wrong fora. Specifically, the Second Circuit applied non-public forum standards to a designated forum. This error was compounded because the Second Circuit has also implicitly introduced another type of discrimination into its forum analysis: "purpose discrimination." This unacknowledged factor, rather than serving a salutary function, incorporates additional

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of Court. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

errors into the Second Circuit's already problematic forum analysis.

The concept of "purpose discrimination" is a misapplication of legitimate questions about purpose which may be raised in proper forum analysis. Schools, such as Respondent in this case can use "purpose discrimination" as an end run around strict scrutiny in a designated forum and around viewpoint discrimination in a non-public forum. Amicus asks this Court to correct the Second Circuit's aberrant forum analysis and reverse the Second Circuit's decision.

ARGUMENT

I. INTRODUCTION

The Second Circuit Court of Appeals held that the forum created by the Milford Central School (Milford) was a limited forum and that, therefore, the restrictions that Milford has placed on speech in its forum "will withstand First Amendment challenge if they are reasonable and viewpoint neutral." *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 508 (2d Cir. 2000). Thus, it is understandable that the parties should concentrate their arguments on viewpoint neutrality.

However, Amicus believes that the already murky issue of forum analysis will be further obfuscated if certain problems with both Milford's policy and the Second Circuit's forum analysis in this case are not met head on. It is the goal of this brief to point out these problems.

II. THE SECOND CIRCUIT'S ANALYSIS IN THIS CASE IS FLAWED BY FORUM TERMINOLOGY CONFUSION

First, the Second Circuit participated in confusion in forum terminology. See *Good News Club* 202 F.3d at 508-10. This Court has traditionally used a tripartite forum classification system. Under this system a forum is categorized as a traditional public forum, a designed public forum, or a non-public forum. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802-03 (1985). However, a designated public forum may be opened to the public at large or for particular speakers or for particular subject matters. *Id.* Finally, the term "limited public forum" can be used as a synonym for a designated public forum, as in the *Cornelius* Court's discussion of the Respondent's characterization of the forum at issue in that case. *Id.* at 804. However, the term "limited public forum" can be used as a synonym for a non-public forum. That is how this Court used the term in *Rosenberger v. Rectors & Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995), in its description of *Cornelius'* non-public forum.

A. Terminological Confusion Can Lead to Applying the Wrong Standards to Fora

Thus, it is all too easy to apply the "reasonable and viewpoint neutral" test to fora to which it is inapplicable. This standard is applicable to so-called limited fora which are actually non-public fora, but not necessarily to limited fora which are designated public fora.

This can be illustrated by imagining that the case of *Widmar v. Vincent*, 454 U.S. 263 (1981) had arisen in the Second Circuit instead of the Eight Circuit and that it had arisen after *Cornelius* and *Rosenberger* rather than before them. The Widmar forum could be described as a limited public forum under *Cornelius'* use of the term. The rule for a limited public forum in *Rosenberger* is the reasonable and viewpoint neutral test. Thus, by ignoring the fact that the single term "limited public forum" can describe two completely different types of fora, the Second Circuit could have ruled in *Widmar* that the restriction against the student group was reasonable and viewpoint neutral. The restriction could have stood up under such a standard. However, such an oversight would have stood First Amendment principle on their heads. This Court held that the applicable standard in *Widmar* was strict scrutiny, requiring the university "to show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 454 U.S. at 270.

B. This Confusion Led the Second Circuit to Apply the Wrong Standards to Milford's Forum

In light of this illustration, how do we know that the Second Circuit's analysis in the instant case did not partake of exactly this error? Amicus believes that the Second Circuit did, in fact, apply the rule for one type of limited forum (*i.e.*, the non-public forum) to the other type of limited forum (*i.e.*, the designated public forum).

This error can be seen by examining what the Second Circuit wrote in its discussion of Milford's "limited forum." After delineating the tripartite forum

categories, the Second Circuit made short shrift of the rest of the analysis:

> Limited public forums are those that the government has designated as a "place. . . of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Bronx Household of Faith*, 127 F.3d at 211 (quotation omitted). We have previously held on a number of occasions that N.Y. Education Law § 414 and policies promulgated thereunder create limited public forums. *See, e.g., Full Gospel Tabernacle v. Community Sch. Dist. 27*, 164 F.3d 829, 829 (2d Cir. 1999) (*per curiam*), *aff'g* 979 F. Supp. 214, 220 (S.D.N.Y. 1997); *Bronx Household of Faith*, 127 F.3d at 215; *Deeper Life Christian Fellowship, Inc. v. Board of Educ., ("Deeper Life I")* 852 F.2d 676, 680 (2d Cir. 1988). Milford's Community Use Policy specifies who may use school facilities, when, and for what purposes. The parties agree, as they did in the court below, that the Milford school has created a limited public forum. In light of our precedent, the district court's conclusion, and the parties' agreement, we think it clear that the Community Use Policy has created a limited public forum in the Milford school facilities.
>
> Restrictions on speech in a limited public forum will withstand First

> Amendment challenge if they are reasonable and viewpoint neutral. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995); *Bronx Household of Faith*, 127 F.3d at 214.

Good News Club v. Milford Cent. Sch., 202 F.3d 502, 508-09 (footnote omitted).[2]

This quotation makes it clear that the Second Circuit is applying the non-public forum standard to the restrictions in the instant case. This is only appropriate if its determination that the forum is a limited forum means that the forum is a non-public forum. If, in fact, the determination that the forum is a limited forum actually means that the forum is a designated public forum, then the Second Circuit has made exactly the mistake pointed out by our *Widmar* hypothetical.

We should, therefore, consider which type of forum the Second Circuit actually considered the Milford policy to create. The Second Circuit cited three sources for its conclusion that the forum was a "limited forum": "precedent, the district court's conclusion, and the parties'

[2] Here and hereafter, most of the citations in this brief's case quotations have been left in, even though this necessarily lengthens the quotations. The reason is simple. Because of the nature of the argument made in this brief, Amicus believes it will help this Court to see how the Second Circuit and the New York district courts have used (or misused) forum cases.

agreement." *Good News*, 202 F.3d at 509. Because the district court relied on many of the same cases as the Second Circuit, it is helpful to consider these two sources together. Once we have sorted out these matters, it will become obvious that the parties' agreement that Milford's forum is a "limited" one cannot control what standard controls the restrictions at issue.

The discussion of limited fora by the district court is most informative, especially since the Second Circuit embraced it by reference. Here one can see the indiscriminate mixing of non-public forum and designated public forum standards and analyses:[3]

> "Limited public forums are 'created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.'" *Bronx Household*, 127 F.3d at 211 (quoting *Cornelius*, 473 U.S. at 802). When a state opens a forum to the general public, the state is "bound by the same standards as apply in a traditional public forum."

[3] As noted previously, Amicus has deliberately left case citations in most quotations because it believes that this Court needs to see how the cases have been used. The same rationale underlies the inclusion of quotations such as this one which could otherwise be summarized in a few succinct sentences. That, however, would not allow this Court to see the mixing and matching of concepts and misapplication of cases that Amicus seeks to demonstrate.

Perry, 460 U.S. at 46. Accordingly, while the First Amendment permits reasonable time, place, and manner regulations, it forbids the state to enforce content-based exclusions unless narrowly drawn to serve a compelling state interest. *See id.*; *Travis*, 927 F.2d at 692.

The State "is not required to indefinitely retain the open character" of a limited public forum, however, *Perry*, 460 U.S. at 46, and an entity such as a school district is entitled, as is a private owner of property, to "preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel*, 508 U.S. at 390. A state may therefore designate a forum as public "but limit[] the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Travis*, 927 F.2d at 692; *see also Rosenberger*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created justify the State in reserving it for certain groups or for the discussion of certain topics."); *Perry*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access based on the basis of the subject matter and speaker identity."). Such content-based limitations are permissible to the extent that they preserve the purposes of the limited forum and are viewpoint neutral. *Rosenberger*, 515 U.S.

at 829-30; *Lamb's Chapel*, 508 U.S. at 393; *Bronx Household*, 127 F.3d at 211 ("Restrictions on access based on speaker identity and subject matter are permissible only if 'the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'") (quoting *Cornelius*, 473 U.S. at 806).

As to those specified uses for which such property *is* designated a public forum, the same First Amendment protections accorded traditional public forums apply. *See Perry*, 460 U.S. at 46; *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986). In other words, constitutional protection in a limited public forum is afforded only to "expressive activity of a genre similar to those that government has admitted to the limited public forum." *Travis*, 927 F.2d at 692 ("The government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."). Therefore, to succeed, plaintiffs must establish that the District's use policies "created a limited public forum intended to benefit . . . organizations such as [Good News] and encompassing the purposes for which the organization seeks to use the school property," *Deeper Life*, 852 F.2d at 680, and permitted similar organizations to use

the school facilities for similar purposes. *See Bronx Household*, 127 F.3d at 214.

Good News Club v. Milford Central Sch., 21 F. Supp. 2d 147, 153 (N.D.N.Y. 1998).

In this approach by the district court, one can see two things. First, the district court appears to make exactly the kind of mistake we have described in the *Widmar* hypothetical. After using the term "limited" to describe a designated public forum, the district court then invokes the non-public forum "reasonable and viewpoint neutral" standard.

III. THE SECOND CIRCUIT'S ANALYSIS IN THIS CASE IS FLAWED BY PARADIGM CONFUSION

Second, the district court is—without acknowledging it—also using the Second Circuit's paradigm of the limited public forum as a subset of designated public forums. This approach is explicitly discussed in cases such as *Full Gospel Tabernacle v. Community School District 27*, 979 F. Supp. 214 (S.D.N.Y 1997) and *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, (2d Cir. 1988). For example, in *Full Gospel*, the court explained the limited public forum this way:

> In addition, the Second Circuit has recognized a sub-set of designated public forums termed limited public forums. *See, e.g., Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679 (2d Cir. 1988). This sub-category includes property designated by the government for use by certain groups or for the discussion of certain subjects. *Perry*, 460 U.S. at 46 n.7; *Cornelius*, 473 U.S. at 802. As to those particular groups and subjects, the forum is an open one, and any regulation based on content must be narrowly tailored to serve a compelling government interest. *Perry*, 460 U.S. at 46. However, "under the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses, and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80 (citations omitted). "Where the proposed use falls outside of the limited forum, the State is subject to only minimal constitutional scrutiny." *Bronx Household of Faith*, 127 F.3d 207, 1997 WL 567035, at *3 (citations and internal quotations omitted).

Full Gospel, 979 F. Supp. at 218-19.

This particular articulation of this paradigm does not sound that bad. At least the *Widmar* hypothetical would probably have been decided correctly. However, the fine points are often lost. For example, in *Bronx Household* one finds the following discussion:

Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802; *see also Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991). But restrictions on access based on speaker identity and subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). Where the proposed use falls outside of the limited forum, "the State is subject to only minimal constitutional scrutiny." *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996).

> A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. *See Perry*, 460 U.S. at 46. In such a forum, the government may make "distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49.

Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 211-12 (2d Cir. 1997). Gone is all mention of strict scrutiny in a designated forum.

Thus, the district court—and by adoption, the Second Circuit—used the limited-forum-as-sub-set-

paradigm or participated in general terminological confusion or both. In any event, it seems clear that both courts did engage in the *Widmar* hypothetical error.

IV. THE SECOND CIRCUIT HAS FURTHER CONFUSED FORUM ANALYSIS BY INTRODUCING "PURPOSE DISCRIMINATION"

Furthermore, a second problem remains to be addressed. And again the problem exists whether it is created by the limited-forum-as-sub-set-paradigm or general terminological confusion or both. The second problem, which arises from the first, is that the concept of purpose is intruded into the court's forum analysis in an inappropriate way.

In effect, the confusion becomes two-fold. First, fora that are in reality designated public fora are identified as non-public fora. In the worst cases, the strict scrutiny standard is completely lost. Second, a new type of discrimination occurs. This discrimination is not recognized and thus is not evaluated. One can call this new discrimination, "purpose discrimination."

Perhaps it is the sensed, yet unidentified, influence of this factor that has led some jurists to express the difficulty involved in forum analysis. For example in the instant case, Judge Jacobs in dissent wrote, "[W]hen the subject matter is morals and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters." *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 512 (Jacobs, J., dissenting). As this brief hopes to illustrate below, the quixotic nature of this endeavor is made even more difficult when "purpose discrimination" clouds the picture.

To try to understand how the false concept of "purpose discrimination" has crept into the Second Circuit's jurisprudence and into Milford's policy, one can look at two matters. First, one can examine the proper role of purpose in forum analysis. Then one can compare this to what the Second Circuit and Milford have done with purpose.

A. The Role of Purpose in Proper Forum Analysis

Purpose plays two roles in proper forum analysis. First, an examination of purpose may be required to determine what type of forum exists. The inquiry here is into what the intended purpose of the property (or other forum) is. However, the inquiry into purpose is really an inquiry into the nature of the forum, not into self-serving statements as to the only acceptable purposes for the forum. After all, the point of forum analysis is to help the courts balance the interest of the government property owner in limiting the forum's purpose as it sees fit with the interest in the individual or organization in using the property for *other* purposes. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). In this sense, purpose is an issue totally separate from subject matter discrimination, speaker identity discrimination, or viewpoint discrimination. Thus, in *Cornelius*, much of this Court's discussion of purpose was aimed at ascertaining the type of forum that the Combined Federal Campaign constituted. *Id.* at 803-06.

Purpose has a second legitimate place in a proper forum analysis. After the determination of the forum type, purpose will be looked at again *if the forum turned out to be a non-public forum*. In such a non-public

forum, "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 46. Therefore, if a court has determined that a forum is a non-public forum, it may examine whether the purpose of the forum renders the regulation reasonable.

B. The Erroneous Role of Purpose in the Second Circuit's Aberrant Forum Analysis

All of this is a far cry from what the Second Circuit has done. By interjecting purpose into the discussion of "limited" fora, even if a "limited" forum is actually a designated forum, another layer of confusion has been added. Thus, under the Second Circuit's forum analysis, schools, such as Milford, can now engage in "purpose discrimination."

This is especially problematic in that "purpose" is now used with an entirely different meaning than the one that word had when it was used to establish the original forum analysis. As noted above, in proper forum analysis, purpose is related to the nature of the forum. Thus, for example, in *Cornelius*, this Court discussed whether the purpose of the forum was to increase expressive activity or decrease expressive activity. 473 U.S. at 803-06. Similarly, this Court discussed whether the purpose of the forum was to increase workplace disruption or to decrease workplace disruption. *Id.* This use of the word "purpose" is vastly different from how Milford uses the term.

Milford uses the term "purpose" to discriminate against activities that it cannot legitimately discriminate against on any other grounds. For example, Milford could not prevent discrimination against the Good News Club on the basis of speaker identity because the policy opens the forum to community groups such as the Club. *See* Milford Central School's Policy of Community Use of School Facilities. Milford cannot discriminate against the Club on the basis of subject matter under a proper approach to forum analysis since nowhere does the policy exclude either morality or religion as a *topic of discussion*. *Id*. Indeed, the *topic* of religion is surely permitted under those parts of the policy which allow "instruction in any branch of education, learning or the arts" and "uses pertaining to the welfare of the community." *Id*. Milford cannot discriminate against the Club on the basis of viewpoint under *Lamb's Chapel v. Center Moriches School District*, 515 U.S. 384 (1993). Rather, Milford attempts to discriminate against the Club based on its "religious *purpose*."

Milford attempts to use this self-serving new type of discrimination as a trump card. But this Court should not allow this misuse of the word "purpose" to forestall proper analysis. After all, as noted above, the very reason for resorting to forum analysis at all is to determine whether citizens can use government property for expressive activities that the government property owner seeks to squelch. *Cornelius,* 473 U.S. at 800. It is no analysis at all to say that, because the government asserts that no religious purpose can be carried out on its property, indeed no religious purpose can be carried out. This Court should instead use the word "purpose" as it always has. Was Milford's purpose to encourage or discourage expressive activity? Was Milford's purpose

to accommodate and facilitate community groups or to make it difficult for them to access school property? Was Milford's purpose to create a wide ranging community forum or a very narrow forum?

The purposes of Milford's policy are plain on its face. The answer to every question posed above cuts in the Club's favor. In addition, the policy also legitimately encompasses the purpose of avoiding disruption to normal school operation. Milford Central School's Policy of Community Use of School Facilities. The Club's desired use poses no problem on this front. Thus, the only "purpose" that can stand in conflict with the Club's requested use, is the putative "purpose discrimination" trump card. But that "purpose" is not really a purpose at all.

V. "PURPOSE DISCRIMINATION" CAN SERVE AS AN END RUN AROUND STRICT SCRUTINY AND AROUND VIEWPOINT DISCRIMINATION

Two implications are implicit in the above discussion. First, the Second Circuit may have erred in its characterization of Milford's forum. Since it decided that Milford had created a "limited" forum, it may have meant a non-public forum or it may have meant a designated forum. If the Second Circuit meant that Milford's forum was a non-public forum, Amicus contends that it erred. In light of its policy and after removing the confusion created by terminology and the "purpose discrimination" trump card, Amicus believes that Milford's forum is surely a designated public forum. Therefore, "purpose discrimination" must not be allowed to blind this Court's analysis. This Court should apply strict scrutiny to Milford's exclusion of the Club just as

this Court applied strict scrutiny to the exclusion of the student organization in *Widmar v. Vincent*, 454 U.S. 263 (1981). "Purpose discrimination" cannot serve as an end run around strict scrutiny.

The second implication is that "purpose discrimination" cannot serve as an end run around viewpoint discrimination either. Thus, even should this Court disagree with amicus and believe that Milford created a non-pubic forum or should this Court examine the exclusion of the Club without a determination of what type of forum existed, "purpose discrimination" must still be seen through. In this context, purpose discrimination serves as a disguise for viewpoint discrimination. Purpose discrimination would allow Milford to claim that it is not engaging in viewpoint discrimination. After all, the argument goes, Milford actually allows a religious viewpoint on many subjects. It is not the Club's religious viewpoint that is the problem; it is its religious purpose.

However, while Milford may allow a religious viewpoint on some topics, it certainly does not allow a religious viewpoint on religion, which is an otherwise allowable subject. Thus, under the policy provisions which allow "instruction in any branch of education, learning or the arts" and "uses pertaining to the welfare of the community," Milford Central School's Policy of Community Use of School Facilities, religion could be discussed from a sociological, anthropological, historical, or other academic viewpoint, but not from a religious viewpoint. After all, a religious viewpoint on religion may involve a devotional response, as well as living out the precepts of the religion under discussion

and teaching them to the next generation.[4] And this is exactly what Milford objected to. They did not want the Club to engage in Scripture memorization or worship or evangelistic Bible lessons on school premises. *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 152 (quoting a letter from Milford's Superintendent McGruder). Thus, at a minimum, "purpose discrimination" served as a disguise for discriminating against a religious viewpoint on the otherwise includable subject of religion.

This Court should identify the erroneous elements that have crept into the Second Circuit's forum analysis and clarify how forum analysis should be undertaken. Amicus believes that, having done so, this Court will conclude that Milford cannot open its forum to the degree that it has and yet limit religion's access to viewpoint on subjects that Milford considers to be secular enough. Whether this Court decides that Milford's limited forum is a designated public forum or a non-public forum or declines to rule on the forum type, Milford cannot engage in "purpose discrimination." The Second Circuit has used "purpose" to mean something totally other than what it means in proper forum analysis. For schools that want to be hostile to religion, the Second Circuit has created an unassailable hiding place. It has also led astray those schools that are just trying to do the right thing.

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[4] Amicus also draws the Court's attention to the similar, though different, argument about excluding the religious viewpoint on morals and character made by the Club its Petition for Writ of Certiorari at 10-13.

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In the Supreme Court of the United States

THE GOOD NEWS CLUB, ET AL., PETITIONERS,

v.

MILFORD CENTRAL SCHOOL, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* FOR 20 THEOLOGIANS AND SCHOLARS OF RELIGION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment permits the government to distinguish between "religious instruction" and "the teaching of values or morals from a religious viewpoint" for the purpose of excluding the former from a limited public forum.

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INTEREST OF THE *AMICI CURIAE*[1]

The decision of the Second Circuit is premised on the notion that it is "not difficult" for government authorities to distinguish between moral instruction "from a religious viewpoint," on one hand, and "religious instruction," on the other. *Good News Club* v. *Milford Central School*, 202 F.3d 502, 510 (2d Cir. 2000). Amici curiae are 20 theologians and scholars of religion from a variety of religious traditions. The purpose of this brief is to explain to the Court that the relationship between "moral instruction" and "religious instruction" is differently understood in different religious traditions, and in many is not understood as a coherent distinction at all. For a governmental body — even a court — to draw such a distinction would deeply entangle it in controversial theological judgments and would discriminate between theological views on that relation, in violation of the very First Amendment principles the Second Circuit intended to protect.

The signatories are theologians and scholars of religion representing a wide range of theological perspectives. In signing this brief, they do not indicate any agreement (or disagreement) with the content of the activities conducted by petitioner Good News Club, or with petitioner's religious doctrine. But they are united in the belief that the distinction drawn by the Second Circuit in this case should be rejected by this Court.

Elliott Abrams is President of the Ethics and Public Policy Center in Washington, D.C. He is the author of *Faith or Fear: How Jews Can Survive in a Christian America.*

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae* and their counsel, made a monetary contribution to its preparation and submission.

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SUMMARY OF ARGUMENT

The Court of Appeals held that a public school district may exclude from a limited public forum those groups that wish to engage in "religious instruction," while giving access to other groups that engage in "moral instruction," including moral instruction "from a religious perspective." 202 F.3d at 508. The court declared that such a distinction is "not difficult" to make. *Id.* at 510. A fuller understanding of the relationship between moral and religious instruction in various western religious traditions, however, reveals that this distinction is indeed "difficult," and certainly beyond the capacity of governmental officials and courts. In many traditions of moral and religious thought, the distinction cannot be drawn coherently at all. To allow access to public facilities to be restricted on the basis of such a distinction would therefore be viewpoint discriminatory, in violation of the First Amendment. Moreover, administration of such a distinction would result in needless governmental entanglement in controversial judgments regarding religious doctrine.

ARGUMENT

THE GOVERNMENT CANNOT COHERENTLY DISTINGUISH BETWEEN "MORAL INSTRUCTION FROM A RELIGIOUS PERSPECTIVE" AND "RELIGIOUS INSTRUCTION."

A. The Second Circuit's Attempt To Distinguish Between "Moral Instruction From A Religious Perspective" And "Religious Instruction" Presupposes The Correctness Of One View Of The Relation Between "The Good" and "God's Will."

This Court has unanimously held that the government may not exclude private speakers from a limited public forum on the ground that they wish to speak from a religious viewpoint. *Lamb's Chapel* v. *Center Moriches School District*, 508 U.S.

384 (1993). In an apparent attempt to distinguish *Lamb's Chapel*,[2] the court below held that while speakers engaged in the "teaching of values or morals from a religious viewpoint" are constitutionally entitled to participate in a limited public forum, speakers engaged in "religious instruction" are not. 202 F.3d at 504. Exclusion of "religious instruction," according to the Second Circuit, is a subject matter rather than a viewpoint-based distinction. *Id.* at 510-511.

The Second Circuit has waded into deep theological waters. From the beginning of recorded philosophy and theology, the relation between "God's will" and "the good" has been hotly contested. See Plato, *Euthyphro* (B. Jowett trans., 1988) (asking whether piety is good because the gods love it, or whether the gods love it because it is good); cf. *Genesis* 2:15-18; 3:1-24 (in which acquisition of "knowledge of good and evil" as something separate from the will of God is seen as the primal act of sin). For some, including all secularists and the adherents to a few religions, ethics and religion are distinct subjects. For others, including adherents to many of the mainstream religious traditions of the West, ethics and religion are inextricable: to do God's will is to do the good, and knowledge of the good is ultimately derived from knowledge of the character of God. In some traditions, the relation may be more subtle. For example, some traditions distinguish between reason and revelation, or between natural law and revealed law, within an overarching concept of God's sovereignty and His differing ways of revealing truth to human beings.

The Second Circuit seems unaware of any of this. Without any apparent recognition or acknowledgment that it was taking sides in a long-standing theological and philosophical controversy, the court simply presupposed that morality is independent

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[2] Oddly, the Second Circuit did not cite *Lamb's Chapel*, despite its obvious similarity to this case.

from divine will. According to the court, the teachings of petitioner Good News Club, in common with the groups that are permitted to participate in the forum (Boy Scouts, Girl Scouts, 4-H), "may involve secular values such as obedience or resisting jealousy." 202 F.3d at 509. Such instruction is permissible because it falls within the "subject matter" of "morality." *Id.* at 510.[3] But unlike the other groups, petitioner's teaching "contains an additional layer," namely its religious component. *Id.* at 509. That religious "layer," being a different "subject," may be excluded.

The trouble with this characterization of the issue is that it presupposes an answer to the question—that morality is derived from sources independent of religion. That is why the court categorized obedience and resistance to jealousy as "secular" values. Cf. *Exodus* 20:12, 17 (treating obedience and refraining from covetousness as divinely ordained commands). Once the field of ethics is revealed as ontologically "secular," petitioner's religious teaching can be treated as an entirely different "subject matter" — an additional, and presumably unnecessary, "layer."

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[3] The Community Use Policy of the Milford Central School District allows district residents to use school facilities outside of school hours for "holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community," subject to certain limitations. 202 F.3d at 504. In our view, therefore, the proper question in this case is not whether "religious instruction" falls within the same subject matter category as "moral instruction," but whether it "pertain[s] to the welfare of the community." Furthermore, we do not see how the government could answer that question in the negative without evincing a hostility to religion that is not permitted under the First Amendment. If this analysis is correct, there is no need to reflect further on the lower court's misguided distinction between "moral instruction from a religious perspective" and "religious instruction." Since that is the holding under review, however, we devote this brief to the distinction drawn by the court.

In distinguishing between "viewpoint" and "subject matter" discrimination, therefore, the court itself ironically fell into the trap of committing viewpoint discrimination: it adopted one view of the relation between "God's will" and "the good."

Even within its own terms of reference, the Second Circuit's distinction breaks down. The court concedes — as it must, in light of *Lamb's Chapel* — that the First Amendment protects moral instruction "from a religious perspective." 202 F.3d at 508. To say that there is a "religious perspective" on morality is to say that there are certain *reasons*, based on religious understandings and sources, for the moral propositions that are being instructed. How, then, can it be said that speakers may not call attention to those religious understandings and sources? How can the Second Circuit's distinction be enforced without denying the very right that this Court unanimously held was protected in *Lamb's Chapel*?

As theologians and scholars of religion, we do not all share the same opinion about the right answer to the perennial question of the relation between moral and religious truth. But all of us agree that neither government officials, nor courts, nor even the democratic will of the people, is entitled to declare a single answer to this question — let alone one as naive and simpleminded as that suggested by the Second Circuit.[4]

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[4] The Second Circuit also hinted at a different, but equally problematic, distinction between a group that merely "stat[es] its viewpoint" and one that "is focused on teaching children how to cultivate their relation with God through Jesus Christ." 202 F.3d at 510. But neither the Good News Club nor the other groups — nor any group seriously engaged in training children to grow into morally responsible individuals — stops at "stating its viewpoint." The essence of moral education of children lies in cultivating habits and sensibilities of good character, including love and admiration for role models such as parents, teachers, historical figures, and even (for Christians) Jesus Christ.

Affirmance of the decision below would place government officials as well as courts in an impossible position. First, in attempting to police the line between moral instruction "from a religious perspective" and "religious instruction," they would be forced to engage in a highly detailed examination of the content of the speech under review. This detailed surveillance and censorship is offensive to the constitutional values of both free speech and non-establishment. As the Court explained in *Widmar* v. *Vincent*, 454 U.S. 263, 269-270 n.6 (1981), "[m]erely to draw the distinction would require the university — and ultimately the courts — to inquire into the significance of words and practices to different religious faiths * * *. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." See also *Thomas* v. *Review Bd.*, 450 U.S. 707, 715, 716 (1981) ("Courts should not undertake to dissect religious beliefs" and "are not arbiters of scriptural interpretation").

Second, any standard for drawing a line between "religious instruction" and "moral instruction from a religious viewpoint" would inevitably be arbitrary. If moral teaching from a religious perspective is constitutionally permitted, then presumably government officials and courts must tolerate a certain amount of religious content. (Surely the speakers are permitted to explain to their audience the sources of their "religious perspective" and why that perspective might be persuasive.) Yet, if religious instruction is truly "an additional layer" — and any group that devotes significant time to teaching about that "additional layer" can be excluded — then public officials and the courts must be alert to exclude those who go beyond a certain *de minimis* level of religious content. But how much is too much? Where there are no criteria for drawing the distinction, there is serious danger of favoritism, bias, and unequal application of the law. See, *e.g.*, *Frazee* v. *Illinois Dep't of Employment Security*, 489 U.S. 829, 833 (1989) (noting "the difficulty of distinguishing between religious and secular convictions"); *Thomas*, 450 U.S. at 714

("The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task").

Indeed, it may be worse than that. The distinction may be self-refuting. If the court is correct that religious instruction is "an additional layer," it follows that the religious instruction is unnecessary and irrelevant to the moral instruction. (Otherwise, the layer would not be "additional" but foundational.) But if the religious component is unnecessary and irrelevant, then there may be no such thing as a "religious perspective" on moral issues. That would be like a "culinary perspective" on geometry. Either religious truth is a legitimate basis for moral reasoning, in which case "moral instruction from a religious perspective" makes sense and "religious instruction" is a necessary component of it, or religious truth is irrelevant (an "additional layer"), in which case there is no such thing as a "religious perspective," and "religious instruction" is a different subject from "moral instruction." By attempting to embrace both sides, the Second Circuit has prescribed for government officials and courts an impossible and self-contradictory task.

Third, by insisting that moral instruction is distinct from religious instruction, the Second Circuit is favoring one perspective on the morality-religion relation over others. There are few more fundamental divides than that between those who believe that "the good" is independent of "God's will" and those who believe the two are connected. Thus, the very drawing of the line violates the prohibition on viewpoint discrimination.

We are not saying that it is impossible to distinguish between religion and morality *from any particular point of view* (*e.g.*, the secular point of view). Thus, the government can address moral questions in its own (necessarily secular) speech without taking a position on religious questions. For example, the government is constitutionally permitted to advocate the morality of protecting the environment, while taking no position on whether this is required because God has entrusted humankind with a duty to be

good stewards of the earth. But the government cannot project such a distinction onto the private speech of religious speakers without violating basic First Amendment norms of viewpoint neutrality. Put another way, the government cannot in effect require private speakers to adopt a religion/morality dichotomy on pain of exclusion from limited public forums to which other citizens are presumptively welcome.

This problem will become clearer as we discuss the positions of various theological traditions on this question, to which we now turn.

B. The Relation Between Moral And Religious Propositions Is A Controversial Question Among Different Theological Traditions, And For Many Is Not A Coherent Distinction.

It is not possible to do justice to the many subtle and varied treatments of the problem at hand, even by the major religious traditions of the West, in the space of an amicus brief. Thus, our aim is simply to acquaint the Court with a small sample of the religious texts that have addressed this issue, in the hope that the Court will not repeat the mistake of the Second Circuit. That mistake was to presuppose that religious instruction is, by its nature, merely an "additional layer" upon, and not a foundational or intrinsic part of, moral instruction. We therefore emphasize religious texts that take the opposite view — that religious and moral instruction are a unified whole, or at least so deeply intertwined that they cannot be separated. We do not thereby intend to argue that this perspective is necessarily correct (though many of us do think so), but merely to warn the Court against thinking that "it is not difficult for school authorities to make the distinction between the discussion of secular subjects from a religious viewpoint and the discussion of religious material through religious instruction and prayer." 202 F.3d at 510 (internal quotations omitted). With all respect to the Second Circuit, it is difficult indeed. Indeed, it cannot be done — at

least, it cannot be done without committing the very viewpoint discrimination that the court was attempting to avoid.

1. The Hebrew Bible

The rich ethical and theological resources of the Hebrew Bible defy summary in this brief space, and we would not be so presumptuous as to claim an authoritative interpretive stance. But it is safe to say that the Hebrew scriptures will not sustain the idea that the subject of morality is separate and distinct from the study of the character, will, and judgments of the Creator.

This can perhaps be seen most clearly in the argumentative structure of the Ten Commandments. On their face, the Commandments demonstrate the unitary connection between behavior and belief, praxis and dogma, ethics and ideology, practice and theology, and duty and doctrine.

For instance, the First Commandment — "Thou shalt have no other gods before me" — is an imperative that presupposes an indicative, "I am the Lord thy God, which have brought thee out of the land of Egypt." Both the indicative and the imperative are intrinsically religious. By contrast, the imperative of the Fifth Commandment — "Honor thy father and thy mother" — may be viewed as social or moral. Yet even this imperative includes a positive sanction — do this "that thy days may be long upon the land which the Lord thy God giveth thee" — that is intrinsically religious. Like intertwining threads of different colors, morals and religious beliefs are inextricably connected in this tradition. Severing one from the other tears the fabric of the faith that these directives codify.

Similarly, the prohibition on murder issued after the Flood was linked to the theological premise that man was created in the image of God. *Genesis* 9:6. And the great statement in the Book of Micah, summarizing "what is good," combines "moral" and "religious" elements: "to do justly, and to love mercy, and to walk humbly with thy God." *Micah* 6:8.

Other passages in the Hebrew Bible similarly assert an ethical/theological unity. Consider, for example, the following verses:

> *Proverbs* 3:5, 6: "Trust in the Lord with all thine heart * * * . In all thy ways acknowledge him, and He shall direct thy paths."
>
> *Ecclesiastes* 12:13, 14: "Fear God, and keep his commandments: for this is the whole duty of man. For God shall bring every work into judgment, with every secret thing, whether it be good, or whether it be evil."

Moral responsibility, in this construct, is enjoined on theological grounds. Thus, it is not possible to draw a line between the common duty of humankind and the content of divine will. Loving God and obeying His commandments are one and the same. Neither is a matter of merely "stating [a] viewpoint" (202 F.3d at 510), but of directing one's heart toward God. In short, these representative passages establish a psychological unity, where beliefs and morals are not separable categories, but are like two legs of the same breathing organism. To amputate one would cripple the organism.

Even the terminology of the Hebrew Bible militates against a dichotomy between "moral instruction" and "religious instruction." Consider, for example, the Hebrew term "knowledge" (*yd'*) — which, of course, is the intended result of instruction. As demonstrated by an examination of the contexts in which it is used, this term does not signify a mere intellectual assent or comprehension, but rather a knowledge born of personal experience. Indeed, the term *yd'* is commonly used in conjunction with other terms that graphically convey this sense of experience: intercourse (*Genesis* 4:1, 17), childlessness (*Isaiah* 47:8),

sickness (*Isaiah* 53:8), and punishment (*Jeremiah* 16:21).[5] Thus, the most repeated phrase in the Book of *Exodus*, "that they may know me" (6:7; 7:17; 10:2; 16:12; 29:46; 31:13), can be understood as a statement of the aim of the entire Book.[6] God's approach to humankind was to prove His compassion (3:7, 9, 16; 6:5) and covenant-keeping character (3:6, 15, 16; 6:3-5) by His actions. In this way the people would obtain an experiential knowledge of His nature. The sum of the resulting religion was to revere and experience God. It follows that the experience of God does not allow for a separation into artificial, arbitrary categories such as "religious/moral"; rather, the sum of Biblical religion engulfs the totality of a person's experience.

Similarly, the meaning of the Hebrew term "heart" (*lb*) also suggests that there is no intelligible distinction between morality and religion within the Biblical frame of reference. This wide-ranging term circumscribes its semantic cousins — "spirit," "mind," "bowels," and "inward part" — and connotes the entire inner person. The inner person (*lb*) and the outer person (*bcr*) together make up the whole person (*npsh*). Accordingly, the English term "heart," because it primarily connotes emotion, is only a partial equivalent to the Hebrew *lb* — perhaps the nearest English equivalent is "psyche." Its 856 appearances (including the verb *lbb*) indicate that it is the most common anthropological term in the entire Hebrew Bible.

Although *lb* includes the entire inner person, it has different emphases in various contexts. Emotionally, for instance, the *lb* experiences sorrow (I *Samuel* 1:8), anxiety (I *Samuel* 9:20), sympathy (*Hosea* 11:8), and joy (I *Samuel* 9:20). At the news of

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[5] See generally Rudolph Bultmann, *Ginosko*, in 1 Gerhard Kittel, ed., THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT 696 (Geoffrey W. Bromiley ed. & trans., 1964).

[6] J. Kenneth Eakins, *The Plagues and the Crossing of the Red Sea*, 74 REVIEW & EXPOSITOR 477 (1977).

her pregnancy, Hannah's *lb* rose from sadness to joy (I *Samuel* 1:8; 2:1).

Volitionally, to "fear God" (*Jeremiah* 32:40), to "trust in the Lord" (*Proverbs* 3:5), and to choose obedience (*Daniel* 1:8) are all decisions the *lb* must make. Daniel decided in his *lb* "not to defile himself with the king's food" (*Daniel* 1:8). The people in Nehemiah's day had a *lb* "to work" (*Nehemiah* 4:6). In *Psalm* 20:4, *lb* and "plans" are paralleled synonymously.

Intellectually, the *lb* is the seat of the imagination (*Jeremiah* 14:14), visions (*Jeremiah* 23:16), insight (I *Kings* 5:9), and knowledge (*Job* 8:10). "The *lb* seeks knowledge" (*Proverbs* 8:5). When Samson told Delilah the secret of his strength, he imparted to her knowledge from his *lb* (*Judges* 16:15, 17, 18). The Psalmist hides God's word in his memory, or *lb* (*Psalm* 119:11). The Septuagint translates the intellectual sense of *lb* to the Greek term "understanding" (in *Proverbs* 3:7) or "mind" (in *Job* 7:17). The Second Circuit's idea that instructing the "mind" regarding the good is an entirely different "subject" than inclining "the heart" toward God therefore contradicts the psychological unity presupposed by the Biblical term, *lb*. In sum, the division of the realms proposed by the Second Circuit is psychologically as well as theologically artificial from the point of view presented in the Hebrew Bible.

Finally, the structure of legal and ethical precepts in the Hebrew Bible is not consistent with the morality/religion dichotomy posited by the court below. Legal dictates regarded by some as "secular" and "non-sectarian" are defined as expressly religious by the Hebrew Bible. Indeed, whereas the Second Circuit labeled the values of "obedience" and "resisting jealousy" as "secular values" (202 F.3d at 509), the Hebrew Bible does the opposite. See *Exodus* 20:12, 17.

A review of several key terms related to capital punishment as prescribed in the Hebrew Bible reveals not only the severity of violating God's moral precepts but also their pervasively

religious nature. For example, the death penalty is prescribed not only for murder (*Exodus* 21:12), kidnapping (*Exodus* 21:16), striking or cursing parents (*Exodus* 21:15, 17), and bestiality (*Exodus* 22.19), but for sorcery (*Exodus* 22:18), sacrificing to other gods (*Exodus* 22:20), and profaning the Sabbath (*Exodus* 31:14, 15). Capital punishment also applied to eating leavened bread at the time of unleavened bread (*Exodus* 12:15, 19), and copying the recipe of the anointing oil (*Exodus* 30:30,38). Lesser penalities were imposed for mistreatment of a widow, orphan, or alien (*Exodus* 22:24).

Regardless of the offense and particular sanction, however, all infractions were viewed in the context of the all-inclusive relationship between God and His people. God, who calls Israel "my son" (*Exodus* 4:22) and "my firstborn" (*Exodus* 4:22), also declares them a "valued possession" (*Exodus* 19:5), a "kingdom of priests" (*Exodus* 19:6), and a "holy nation" (*ibid.*). Nothing is outside the scope of God's direct rule. The literary structures and motifs of moral/legal injunction, father/son relationship, and possessor/possession relation imply a manner of thinking that is intrinsically theological, not one that permits a division between the "moral" and the "religious." The Second Circuit's proposed dichotomy thus cannot be projected onto those who follow the tradition of the Hebrew Bible (a group that includes many millions of Jews, Muslims, and Christians) without violence to the text.

2. Post-Biblical Judaism

Rabbinical teaching affirms and extends the orientation displayed in the Hebrew Bible. There may be debate about the extent to which human intuitions and reasoning play a role in Jewish legal deliberations (*halakha*), but there is no doubt that morality is primarily understood as the fulfillment of God's revealed will accompanied by the sanctions of divine displeasure and reward. A cursory review of the Holiness Code (*Leviticus* 19), interpreted by the authoritative legal midrash (*Safra*) and

Talmud, and as cited in the 11th century commentary of Rashi that has become virtually canonical, illustrates this. The Code's admonition that "One must revere father and mother and keep my Sabbaths; I am God" (19:3) teaches that respect for parents cannot override obligations to God: "for I am God — all of you are obligated to honor Me" (*Talmud bYevamot* 5b and Rashi).

Similarly, the duty to donate agricultural produce to the poor is justified with the phrase "I am the Lord your God," meaning, "I am the Judge who will collect [if you fail to do so]" (Rashi to *Leviticus* 19:10, based on Safra). The prohibition on giving misleading advice, "Do not place a stumbling block before the blind; and you shall fear your God" (19:14), is glossed by Rashi (based on Safra): "Because people cannot know whether the intent of this person was benevolent or malicious * * * it says that you must fear God who knows your thoughts." The exhortation not to "stand idly by when your neighbor is endangered; I am God" is explained by Rashi (following Safra) as a promise that God will faithfully reward and punish. When the sage Hillel reformulates the admonition to "love thy neighbor as thyself; I am God" (19:18) as the injunction not to do to your friend what you dislike (*Talmud bShabbat* 31a), Rashi explains that "your friend" refers to God. Morality is thus inseparable from the divine sanction and the divine encounter in this tradition.

In the medieval period, some Jewish thinkers constructively engaged with the Greek philosophical tradition. Consequently, they were inclined to believe that reason, unaided by revelation, could help human beings in their quest for moral truth. Yet even these philosophers insisted on the necessity of divine revelation as the basis for the absoluteness of the moral claim and for many aspects of its content. This is demonstrably the case with medieval rationalism's two foremost representatives.

Saadia Gaon (10th century), in his *Beliefs and Doctrines* (Book 3), maintains that all moral obligations are rooted in gratitude to God. Moreover, even when moral truths can be

deduced rationally, it is important that they be adhered to as manifestations of the divine will, for not all individuals will immediately arrive at these rational truths and none will possess them with absolute precision. Saadia's account of the Aristotelian mean (Book10) is likewise grounded in a theological account of human finitude: to adopt any character trait without qualification is wrong because it entails arrogating to oneself a divine infallibility.

Likewise, Maimonides, in his influential 12th century code of law, justifies his theologically modified version of the Aristotelian mean by arguing that it is identical to the divinely instituted "way of God," and fulfills the biblical commandment of *Imitatio Dei* (*Mishneh Torah*, "Laws of Character Traits," chapter 1). He also holds that no human being adhering to the law solely on the basis of his own reason, without believing in its revealed status, can be called "saintly" (*hasid*), but, at best, accounted as "wise" (*hakham*) ("Laws of Kings," chapter 10).

These are the views of the Jewish philosophers who valued Greek philosophical wisdom. It is natural, and correct, to infer that prominent authorities who did not share their orientation were even more skeptical about the possibility of presenting moral teaching without constant reference to divine instruction and example.

Contemporary Jewish thought, to a much greater degree than its classic sources, has devoted attention to the problem of discourse about morality in a pluralistic society. The following statement by Rabbi Joseph Soloveitchik (1903-1993), the preeminent rabbinic figure in American Orthodoxy, is taken from a set of guidelines on interfaith dialogue that have been adopted as binding by the Rabbinical Council of America, the largest grouping of Orthodox Rabbis in the United States. It is thus representative of a powerful standpoint of Jewish self-understanding as well as a perspective on the way in which

Jewish tradition conceives of other religious traditions. Rabbi Soloveitchik writes:

> As men of God, our thoughts, feelings, perceptions and terminology bear the imprint of a religious world outlook. We define ideas in religious categories and we express our feelings in a peculiar language which quite often is incomprehensible to the secularist. In discussions we apply the religious yardstick and the religious idiom. We evaluate man as the bearer of God's Likeness. We define morality as an act of *Imitatio Dei*, etc.

Rabbinical Council Record, Feb. 1966, reprinted in N. Lamm & W. Wurzburger, A TREASURY OF "TRADITION" 78-80 (1967). In sum, it is clear that post-Biblical Jewish thought primarily conceives of morality in relation to the will of God.

3. Islamic Sources

Historic Islamic law, the *Shari'a*, includes four components: the *Qur'an*, which has only 600 lines of defined legal stipulations;[7] the *Hadith*, which is comprised of statements and deeds of Muhammed and the Imams (Imams are the rightful successors to the Prophet in the Shiite branch of Islam);[8] the "ijma," which is the consensus of Islamic legal scholars;[9] and the "aqi," which is comprised of the sitting judges' analogical reasoning in adjudicating cases — *i.e.*, Islamic stare decisis.[10]

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[7] Michael M.J. Fischer, *Legal Postulates in Flux: Justice, Wit, and Hierarchy in Iran*, in LAW AND ISLAM IN THE MIDDLE EAST 115 (Daisy Hilse Dwyer ed., 1990).

[8] Nader Entessar, *Criminal Law and the Legal System in Revolutionary Iran*, 8 B.C. THIRD WORLD L.J. 91, 92 (1988).

[9] *Ibid.*; Fischer, *supra* note 7, at 121.

[10] Entessar, *supra* note 8, at 92; Fischer, *supra* note 7, at 121.

A variety of Qur'anic passages set forth a philosophy that extends to both life and doctrine, without a distinction between morals and beliefs. These passages posit a deity who is all-inclusive in governance and cannot be shirked in praxis or ideology:

> *Sura* 7:54: "Beware! His is the creation and His is the (right to) Rule."
>
> *Sura* 7:3: "Follow the revelation sent unto you from your Lord and do not follow the (so called) guardians other than Him."
>
> *Sura* 114:1-3: "Say (O Muhammad): I seek refuge in the Sustainer of mankind, the Sovereign (Ruler) of mankind, the Lord of mankind."
>
> *Sura* 12:40: "The (right of) Command is for none but Allah. He hath commanded that ye follow none but Him. That is the right way (of life)."
>
> *Sura* 3:26: "Say: O Allah! Owner of the Kingdom! Thou givest kingdom to whom Thou wilt and takest it away from whom Thou wilt."
>
> *Sura* 4:65: "Nay, O Muhammad! By thy Lord, they will not be believers until they accept you as the final arbiter in all their disputes and submit to your decision wholeheartedly without any heartache."
>
> *Sura* 13:111: "None is a partner in His Sovereignty."

These passages presuppose a unity of ethics and theology, life and belief, practice and doctrine, demanding that Islam (and Islam alone) be the source for both realms of human behavior.

4. The Pauline Epistles

The contribution of the Apostle Paul to the New Testament is second in size only to that of Luke, but it is first in terms of es-

tablishing a theological structure. Paul's contribution, as summed up in his thirteen epistles, establishes a theological infrastructure that weds behavior and belief, praxis and dogma, ethics and ideology, practice and theology, and duty and doctrine.

For example, Paul's *Letter to the Ephesians* is structured in two parts, with the first three of six chapters weighted toward belief, dogma, ideology, theology, and doctrine. The connective "therefore (*gar*)," found in the first verse of *Ephesians* 4, is thus a structural marker that signals the change of focus in the following three chapters (four through six), which are heavily weighted toward behavior, praxis, ethics, practice, and duty.

Paul's other epistles display a similar pattern. For instance, Paul's *Letter to the Galatians* is structured in three tiers, with the first two of its six chapters weighted toward a polemical defense of belief and doctrine, the next two chapters weighted toward an explication of belief and doctrine, and the final two chapters marked by its focus on behavior and duty. Similarly, the first eleven of the sixteen chapters of Paul's *Letter to the Romans* are heavily weighted toward a discussion of belief and doctrine. In classic Pauline style, however, the first verse of the twelfth chapter begins with the connective "therefore (*gar*)" — thus marking his transition to a new focus on practice and duty, which occupies the final five chapters of the book.

The "*gar*"—the "therefore"—is the lynchpin of the argument in these epistles. In direct opposition to the Second Circuit's notion that religion and morality are distinct and unrelated "layers" constituting different subject matter categories, Paul's terminology affirms a logical connection between the two. It posits both a theological or doctrinal framework and an ethical or practical consequence. The epistemological structure of one of the four principal contributors to the New Testament thus inextricably binds the idea of the confession of religious truth with an appeal to live in a manner that reflects one's beliefs. Dissecting these two intertwining fields would not only be

religiously impermissible, but psychologically impossible, in the tradition that follows the teachings of Paul.

5. Protestant Sources

As with many religious traditions, it is difficult to generalize about the views of Protestant Christian sources regarding the connection between ethics and faith. Protestant traditions range from Biblical prescriptivism not unlike that in Orthodox Judaism to a view of divine transcendence so profound that God's will becomes almost unintelligible and all is subsumed in love and wonder. But the Second Circuit's presupposition that a person's relationship with the Creator is merely an "additional layer," essentially irrelevant to the question of how we must live, is virtually incoherent from a Protestant perspective. Consider the first question of the *Westminster Shorter Catechism*, "what is the chief end of man?" "Answer: Man's chief end is to glorify God and enjoy him forever." Explaining this categorical imperative is I *Corinthians* 10:31: "whether ye eat, whether ye drink, or whatsoever ye do, do all to the glory of God." The most mundane of life's activities are thoroughly religious according to this Protestant epistemological construct.

With regard to eternal salvation, historic Protestantism typically places the accent on faith rather than ethics. However, faith (understood as trusting in God's forgiveness through the redemption effected by Jesus Christ) is not adhered to at the expense of ethics (living according to God's will). As the point is expressed in the *Epistle of James* (2:18, 20), "show me thy faith without thy works, and I will show thee my faith by my works. * * * But wilt thou know, O vain man, that faith without works is dead?"

Far from pitting faith against ethics, the several Protestant traditions (Lutheran, Calvinist, Wesleyan, Holiness, et al.) insist that a living faith will issue in a transformed life of loving obedience to God's will. Nor can the moral life be understood apart from faith, as though the latter were a "layer" added to the

former. On the contrary, the regenerate life of loving obedience is the work of the Holy Spirit given to those who accept Jesus Christ as their Lord and Savior. According to the teachers of the Reformation, men and women of faith love their fellows not out of forced conformity to law, but out of an internalized love of God that inspires "passion and love for all God's commands." Martin Luther, *The Larger Catechism*.

This Protestant perspective on moral instruction may be recognized in the Second Circuit's lengthy, if unsympathetic, depiction of what goes on at a meeting of petitioner Good News Club. See 202 F.3d at 504-506. To tell such a group that its focus on the child's "relationship with God" is a *different subject* than another group's teaching about morality is simply to disagree with their theological perspective. The First Amendment does not allow the government to exclude otherwise eligible speakers from a limited public forum on account of such a disagreement.

6. Roman Catholicism

The teaching of the Catholic Church accents the importance of the natural moral law that can be known apart from the revelation of God in Jesus Christ. This teaching has its source in, among other biblical texts, St. Paul's assertion that the lives of all people "show that what the law requires is written on their hearts, while their conscience also bears witness and their conflicting thoughts accuse or perhaps excuse them [on the day of judgment]." *Romans* 2:15. While the natural moral law can be known apart from special revelation, it is not autonomous in the sense of being independent from God's will. On the contrary, natural law is Divine law; it is written on the hearts of human beings by God, who is the Creator of all. In Catholic teaching, "moral instruction from a religious viewpoint" necessarily entails "religious instruction" with respect to the source of moral truth in God and His universal will for all people. Instruction in morality from a Catholic "viewpoint" is therefore inseparable from Catholic beliefs about God.

While the fundamental norms of morality are, according to Catholic teaching, knowable by reason alone, Catholics also believe that these norms are explicitly taught and applied in an authoritative manner by the bishops in union with the bishop of Rome, the Pope. In the Catholic understanding, teaching about morality necessarily entails teaching about the source of moral truth, the motivation for adhering to moral truth, and the specific content or subject matter of moral truth. Competent instruction in morals from a Catholic "viewpoint" necessarily entails a specific understanding of the authoritative instructor, namely, the Church as Catholics believe it is constituted by Jesus Christ Himself. Instruction in morals from a Catholic "viewpoint" is therefore inseparable from Catholics' beliefs about the Church.

Moreover, in Catholic teaching the moral life is inherently and necessarily connected to eternal salvation. Those who have explicit faith in Jesus Christ, as well as those who have only the law written on their hearts, will be judged with respect to their obedience to the will of God as known to them. In the words of the Second Vatican Council: "All the good fruits of our nature and enterprise, we will find them again, but freed of stain, burnished and transfigured, when Christ hands over [the Kingdom] to the Father." *Pastoral Constitution on the Church in the Modern World* at 39. Pope John Paul II writes in the encyclical, *The Splendor of Truth*, "[T]he Church knows that it is precisely *on the path of the moral life that the way of salvation is open to all*." Therefore, instruction in morals from a Catholic "viewpoint" is inseparable from Catholic doctrine about eternal salvation and the universal destiny of all humankind.

* * * * *

The Second Circuit's facile assumption that religious and moral instruction are different "subjects," and thus that a distinction can be drawn between those who teach morality "from a religious perspective" and those who simply teach "religion," is belied by the experience and teaching of many of this nation's

religious traditions. The line drawn by the court is incoherent in principle, and would be virtually impossible to administer in practice, without picking and choosing among different religious viewpoints regarding the relationship between "the good"and "God's will." At bottom, the holding of the court below restricts access to limited public forums to groups that are willing to compartmentalize their faith — to treat religion and morality, ethics and theology, as "different subjects." The First Amendment does not permit such a restriction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals - For The Second Circuit

BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; AND NATIONAL COUNCIL OF JEWISH WOMEN, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. To that end, ADL has filed *amicus curiae* briefs in many cases before this Court. ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

Hadassah, the Women's Zionist Organization of America, Inc. ("Hadassah"), is the largest women's and the largest Jewish membership organization in the United States with over 300,000 members nationwide. Founded in 1912, Hadassah is known for funding and maintaining health care institutions in Israel and has a proud history of protecting the rights of the Jewish community in the United States. Hadassah has long been committed to the principle of strict separation between church and state that has served as a guarantee for religious freedom and diversity. In an effort to uphold this fundamental principle, Hadassah has participated as *amicus curiae* in many cases before this Court.

The National Coalition for Public Education and Religious Liberty ("National PEARL") is a diverse coalition of grassroots and national religious, educational and civic organizations that seeks to preserve religious freedom and the separation of church and state in public education. National PEARL has participated in an *amicus* capacity in many cases before this Court.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *amici curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has long adhered to the view that religious liberty and separation of church and state are constitutional principles that must be protected and preserved in our democratic society. The NCJW has 90,000 members in over 500 communities nationwide.

SUMMARY OF ARGUMENT

1. This Court has long recognized "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979); *see Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Petitioners question whether a public elementary school may open itself as a forum to certain specified types of speech and still exclude from that limited forum religious worship, instruction and indoctrination targeted at the school's children.[2] *Amici* support respondent's categorical exclusion of that speech as both a reasonable, viewpoint-neutral limitation, consistent with the Free Speech Clause of the First Amendment, and as a limitation mandated by the Establishment Clause of the First Amendment.

2. a. Respondent's policy is a reasonable limitation on use of a public school. Just as the government may

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[2] Although respondent's policy provides broadly that school premises may not be used by any organization for "religious purposes," school officials have interpreted the policy to exclude only religious worship, instruction and indoctrination. *See* J.A. at N4 ("I would interpret [the policy to exclude] conducting religious services, providing religious instruction or to an extreme, religious indoctrination into a philosophy or a belief.").

exclude potentially divisive political speech from the workplace to avoid controversy and the appearance of political favoritism, a public school may choose to open itself only to those categories of speech that will further the interests of the community and the school and to exclude those categories of speech – whether religious, political, commercial or other – that may divide the community. While the public school is designed to promote cohesion among a heterogeneous democratic people, the Good News Club is designed to do quite the opposite: to label people as "saved" or "unsaved" and, thus, to promote religious belief in general and Christian belief in particular.

b. In addition to being reasonable, respondent's policy is viewpoint neutral because it excludes an entire category of speech – namely, religion as it is expressed through religious worship, instruction and indoctrination – from a limited public forum. The Good News Club's speech in its evangelizing meetings is distinct from the kinds of speech permitted under the school's policy. The Club's meetings are overt religious exercises, equivalent in all but name and locale to conventional children's services at churches and synagogues across the country. The distinction between religion as supplying an editorial viewpoint and religious worship, instruction and indoctrination as a subject matter is well recognized in both case law and federal statutory law. While excluding this subject matter may in some instances also exclude a point of view, this Court's precedents are clear that the First Amendment is violated only if speech is excluded from the limited public forum *solely* to suppress the point of view.

3. The Establishment Clause stands as an independent bar to the Good News Club's proposed after-school program for elementary school students because it prohibits the public school from *appearing* to take a position on questions of religious belief. Here, in light of (1) the young age and cognitive limitations of the Good News Club's target audience; (2) the Club's proposed use of a

classroom setting immediately after school, very likely side by side with school-sponsored programs that extend the day for so many of the nation's elementary school students; and (3) the nature of the elementary school forum and the relatively small number of other private groups meeting there, it would have appeared to a reasonable observer that the public school was "sponsoring" or "endorsing" the Good News Club's meetings.

4. To affirm the Court of Appeals' judgment, this Court need only agree with – and address – one of these two propositions, either that the Free Speech Clause permits respondent's limitation on outside use of the school or that the Establishment Clause mandates the limitation. On the other hand, to reject both, and thereby reverse the Court of Appeals' judgment, would undermine the ability of a public school to determine for itself what subjects are appropriate for inclusion in the educational forum and would weaken the well-recognized distinction, central to the concept of public education, between secular learning on the one hand and religious worship, instruction and indoctrination on the other. Petitioners' constitutional views, if adopted by the Court, would thus constitute an unprecedented erosion of Establishment Clause values that – because of the age of the students involved here and the role of public schools in imparting democratic values to young students – would reverberate well beyond this particular case. A new generation of children would grow to maturity associating public schools with religious worship and religious learning. This should not be a price that public schools, or the children they educate, must pay for simply accommodating secular groups like the Girl Scouts and the 4-H Club.

ARGUMENT

I. RESPONDENT DID NOT VIOLATE PETITIONERS' FREE SPEECH RIGHTS

It is well established that "[t]he necessities of confining a forum to the limited and legitimate purposes for

which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Where the State has reserved a forum for discussion of only certain topics – as even petitioners acknowledge is the case here, *see* Pet. Br. 15-17; *see also* Pet. App. C12 (District Court opinion) – a restriction on speech is permissible so long as it is "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Rosenberger*, 515 U.S. at 829 (internal quotation marks omitted); *accord Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

A. Respondent's Policy Is Reasonable

Respondent's exclusion of religious worship, instruction and indoctrination,[3] both in general and as applied to the Good News Club specifically, is plainly reasonable. In *Cornelius*, this Court held that a federal policy excluding legal defense and political advocacy organizations from participating in a charity drive aimed at federal employees was reasonable in light of the forum's purpose and the surrounding circumstances. *See* 473 U.S. at 808-10. Observing that a government's decision to restrict access to a limited public forum need only be *reasonable* – not "the most reasonable or the only reasonable limitation," *id.* at 808 – the Court ruled that "avoiding the appearance of political favoritism" and "avoiding controversy" were reasonable bases to exclude such organizations from participation in the drive, *id.* at 809. As the Court concluded, "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a [limited public] forum and hinder its effectiveness for its intended purpose." *Id.* at 811.

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[3] *See supra* note 2.

Excluding religious worship, instruction and indoctrination from public school premises similarly avoids unwarranted controversy and the appearance of favoritism. Just as the government may exclude categories of speech so as to " 'insure[ ] peace' in the federal workplace," *id.* at 810, a public school is surely entitled to open itself only to those categories of speech that will further the interests of the school and the community in cohesiveness and to exclude those categories of speech – whether religious, political, commercial or other – that may divide that community. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools."); *see also Cornelius*, 473 U.S. at 810 ("[T]he Government need *not* wait until havoc is wreaked to restrict access to a [limited public] forum." (emphasis added)).

That this case involves a forum created by, and identified with, a public school makes the policy of excluding religious worship, instruction and indoctrination all the more reasonable. First, state and local school boards are "afforded considerable discretion" in the operation of public schools. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Second, religion is a particularly divisive matter in the public school context. In the oft-quoted words of Justice Frankfurter, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. *In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .* " *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.) (emphasis added); *see id.* at 216-17 ("[T]he public school must keep scrupulously free from entanglement in the strife of sects."). "[J]ust as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects . . . . " *School Dist. of Grand*

Rapids v. Ball, 473 U.S. 373, 382 (1985), *overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997).[4]

Respondent had good reason to believe that the Good News Club's activities in particular would be contrary to the mission of a public elementary school, and therefore would "disrupt [the] forum and hinder its effectiveness." *Cornelius*, 473 U.S. at 811. The core purpose of the Good News Club is to persuade impressionable elementary school children – that is, "children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice," *Ball*, 473 U.S. at 390 – to follow "the Word of God" and to accept Jesus Christ as their "personal Savior." *E.g.*, Lodging at BB4 ("How to Lead a Child to Christ").[5] To this end, the Good News Club teaches that some children are "saved" (those who accept Jesus Christ as their Savior) and others "unsaved" (those who do not); and that some children – the "saved" – are going to go to Heaven while the rest are not. *See, e.g.*, J.A. at P25, P64-65; Lodging at S12, S17, BB5, BB8, BB10.

Thus, for example, the Good News Club's teacher "challenges" the "saved" children to "[s]*top* and *ask* God

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[4] There is a particular risk of appearance of favoritism if only members of a locally dominant faith have the numbers and resources to maintain an after-school religion club. If there were only one or two Jewish, Hindu, or Buddhist children in a school, they could not realistically join clubs analogous to the Good News Club. These children would feel isolated from their classmates – and feel less welcome on school property – solely because of their religions.

[5] The Good News Club is one of the "primary ministries" of the Child Evangelism Fellowship, Inc. That organization's statement of interest in its *amicus curiae* brief here, at App. 1, makes clear that its "whole purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (discipline) them in the local church for Christian living." *See also* Lodging at DD1 (advocating "Helping You Evangelize Children").

for the strength and the 'want' . . . to obey Him" and "invites" the "unsaved" children "to trust the Lord Jesus to be your Savior from sin" and to "receive Him as your Savior." Lodging at BB18, BB24; *see also* J.A. at P64-65, P67-68, P70-71, P75. Club materials teach young and impressionable children that while believers in Jesus Christ "will also be raised [to Heaven], . . . [i]f a person does not receive the Lord Jesus as Saviour, he will not be able to go to Heaven." Lodging at S12, S17. And during meetings, the children pray to "receive Jesus as their personal Savior"; listen to "missionary stories" that "spread[ ] the gospel" and encourage acceptance of Jesus Christ as the Savior; and sing songs with references to God and Jesus Christ. *E.g.*, J.A. at P16-17, P22-23, P25, P28, P66-67, P109; Lodging at BB11, BB47.

In short, while the public school is "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," *McCollum*, 333 U.S. at 216 (opinion of Frankfurter, J.), the Good News Club is designed to do quite the opposite: to label children as either "saved" or "unsaved" and, thus, to promote religious belief in general and Christian belief in particular. Indeed, the Good News Club expressly teaches that adherence to a *particular* faith is essential to one's standing in the community – that those who "have received the Lord Jesus as [their] Savior from sin . . . belong to God's special group – His family." Lodging at S6. Thus, whether or not the Good News Club is nominally open to anyone, *see* J.A. at C2, and whether or not the Club teaches or promotes "any particular *Christian* sect's doctrine or theology," *id.* (emphasis added), respondent's officials were well justified in believing that the Good News Club's meetings would be inconsistent with the purpose of the public school forum. Respondent's limitation on the use of its school building was

reasonable, and so long as that limitation was also viewpoint neutral, the Constitution requires no more.[6]

B. Respondent's Policy Is Viewpoint Neutral

In addition to being reasonable, respondent's policy is viewpoint neutral because it excludes a distinct category of speech from a limited public forum. An exclusion of speech on the basis of *content* is permissible in a *limited* public forum. *See Lamb's Chapel*, 508 U.S. at 392-93. *Lamb's Chapel* simply does not hold that any and all bans on religious activities in a limited public forum violate the First Amendment. Respondent's limitation on use of its forum *is* an exclusion of content – of an entire subject matter – and not an exclusion solely of particular viewpoints bearing on a secular subject matter. The exclusion is not arbitrary, as shown in the discussion of "reasonableness," above. It is also not discriminatory, as it applies to all speech – that is, to all viewpoints (including differing sectarian viewpoints) – on the excluded subject matter of religion as it is expressed through religious worship, instruction and indoctrination.

Petitioners self-servingly characterize their speech as "instruction of morals from a religious perspective." *E.g.*, Pet. Br. 22. Notwithstanding this effort, however, the record clearly demonstrates that the Good News Club's speech at its meetings is different in kind from the speech permitted under the Milford Central School policy – including, for example, meetings of the Boy Scouts, the

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[6] Respondent's policy is of course animated by some of the considerations underlying the Establishment Clause. *See infra* Part II (arguing that respondent was *required* by the Establishment Clause to exclude the Good News Club's activities from school premises). Nevertheless, for purposes of the reasonableness inquiry, the school need only show that its policy is *reasonable* in light of the forum's purposes, *see Cornelius*, 473 U.S. at 809, without regard to Establishment Clause principles.

Girl Scouts and the 4-H Club. The Good News Club's meetings include vocal group prayers, memorization and recital of Bible verses and Scripture, religious songs and discussions based on Bible readings. *See, e.g.*, J.A. at P16-18, P22-23, P25-26. These are "overt religious exercise[s]." *Lee v. Weisman*, 505 U.S. 577, 588 (1992); *see Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring in the judgment) (calling group vocal prayer and Bible readings "manifestly religious exercise[s]"); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (discussing the "religious activity" of prayer). They are equivalent in all but name and locale to conventional church or synagogue services. *Cf. Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 215 (2d Cir. 1997) (describing "church worship services" as "includ[ing] hymn singing, communion, Bible reading, Bible preaching and teaching" (internal quotation marks omitted)).

To the extent the Good News Club's meetings differ from conventional religious services – the meetings involve, for example, prizes, candy and games – this is simply because the Club tailors its evangelizing meetings to its young and impressionable audience. Indeed, the Good News Club's meetings are virtually indistinguishable from children's services commonly held at churches and synagogues across the country, which often involve singing, puzzles, art, stories and prayer.[7]

Nor does it matter that the Good News Club's meetings contain an "instructional" element. First, that element of petitioners' meetings does nothing to change the

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[7] *See, e.g.*, First Union Methodist Church Website (visited January 8, 2001) <http://www.gbgm-umc.org/schenectady/Children%20and%20Worship.htm> (describing "Children and Worship," a "service that is designed for [children] to be age appropriate scripture (story telling) and worship"); Allisonville Christian Church Website (visited January 8, 2001) <http://home.att.net/~allisoncc/children.htm> (describing "Children's Worship: Godly Play," a service for children including singing, story telling, art and food).

essential or overall nature of their speech. Second, the distinction between *religious* instruction and *secular* instruction is not one merely of perspective. To the contrary, religious and secular instruction serve fundamentally different purposes. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223-25 (1963) (distinguishing religious instruction from "nonreligious moral inspiration" and "teaching of secular subjects"); *McCollum*, 333 U.S. at 226 (opinion of Frankfurter, J.) (distinguishing between "secular instruction in subjects concerning religion" and "sectarian teaching"). Religious instruction is designed first and foremost to train adherents of a particular religion in the tenets of that religion's faith and practice. It is not designed, as secular education is, to "prepar[e] . . . individuals for participation as citizens." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

Petitioners' suggestion that no line can be drawn between religion as a viewpoint and religious worship, instruction and indoctrination as a subject matter is without merit. First, although the distinction between content and viewpoint is not always a precise one, *see Rosenberger*, 515 U.S. at 831, there is no reason to believe that officials would not usually be able to draw the requisite distinctions, *see, e.g., Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir. 2000), *reh'g denied*, 231 F.3d 937 (5th Cir. 2000) (per curiam); *Bronx Household*, 127 F.3d at 215. In fact, in the present case – as in *Campbell* and *Bronx Household* – public officials were able to determine from the face of petitioners' application that their proposed use was for an excluded subject matter.

Moreover, the task of distinguishing between "overt religious exercise[s]," *Lee*, 505 U.S. at 588, and other forms of speech is hardly foreign to the law. Indeed, the lines that respondent's officials must draw in implementing their policy are no different from, or more difficult to draw than, the lines that courts and public officials are *required* to draw under current law – for example, between teaching the Bible as a religious text and teaching it as literature, *see, e.g., Edwards*, 482 U.S. at 606-08

(Powell, J., concurring); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam), or between "religious" Christmas displays and "secular" Christmas displays, *see, e.g.*, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 611-13 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 679-86 (1984). *See generally Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (noting that "the Establishment Clause *requires* the State to distinguish between 'religious' speech . . . and 'nonreligious' speech" (emphasis added)). Any number of federal statutes contemplate the same sort of line-drawing without constitutional infirmity.[8]

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[8] *See, e.g.*, 20 U.S.C. § 1011k(c) ("[N]o project assisted with funds under subchapter VII of this chapter . . . shall ever be used for *religious worship* or a *sectarian activity* . . . . "); 20 U.S.C. § 1062(c)(1) ("No grant may be made under this chapter for any educational program, activity, or service related to *sectarian instruction* or *religious worship*, or provided by a school or department of divinity."); 20 U.S.C. § 1066c(c) ("No loan may be made under this part for any educational program, activity or service related to *sectarian instruction* or *religious worship* . . . . "); 20 U.S.C. § 1068e ("The funds appropriated under section 1069f of this title may not be used . . . for . . . any *religious worship* or *sectarian activity* . . . . "); 20 U.S.C. § 1103e ("The funds appropriated under section 1103g of this title may not be used . . . for . . . any *religious worship* or *sectarian activity* . . . . "); 20 U.S.C. § 8897 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for *religious worship or instruction.*"); 25 U.S.C. § 1803(b) ("Funds provided pursuant to this subchapter shall not be used in connection with *religious worship* or *sectarian instruction.*"); 25 U.S.C. § 1813(e) ("No construction assisted with funds under this section shall be used for *religious worship* or a *sectarian activity* . . . . "); 25 U.S.C. § 2503(b)(2) ("Funds provided under any grant made under this chapter may not be used in connection with *religious worship* or *sectarian instruction.*"); 25 U.S.C. § 3306(a) ("None of the funds made available under this subchapter may be used . . . for any *religious worship* or *sectarian activity.*"); 29 U.S.C. § 2938(a)(3) ("Participants shall not be employed under this chapter to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for *sectarian instruction* or as a place for *religious worship* . . . . "); 42 U.S.C. § 604a(j) ("No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for *sectarian worship, instruction, or proselytization.*"); 42 U.S.C. § 2753(b)(1)(C) (allowing federal grants to be used for student work-study that "does not involve the construction, operation, or maintenance of so much of any facility as is used or is to be used for *sectarian instruction* or as a place for *religious worship*"); 42 U.S.C. § 3027(a)(14)(A)(iv) (requiring a state seeking federal aid for construction of a center for the elderly to promise that "the facility will not be used and is not intended to be used for *sectarian instruction* or as a place for *religious worship*"); 42 U.S.C. § 5001(a)(2) (providing federal grants to support volunteer projects for the elderly, but excluding "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for *sectarian instruction* or as a place for *religious worship*"); 42 U.S.C. § 9807(a)(9) ("[N]o participant will be employed on projects involving . . . the construction, operation, or maintenance of so much of any facility as is used or to be used for *sectarian instruction* or as a place for *religious worship.*"); 42 U.S.C. § 9858k(a) ("No financial assistance provided under this subchapter . . . shall be expended for any sectarian purpose or activity, including *sectarian worship or instruction.*"); 42 U.S.C. § 9920(c) ("No funds provided directly to a religious organization to provide assistance under any program described in subsection (a) shall be expended for *sectarian worship, instruction, or proselytization.*"); 42 U.S.C. § 13791(b)(B)(iv) ("Religious organizations . . . shall not provide any *sectarian instruction* or *sectarian worship* in connection with an activity funded under this subchapter . . . . ") (emphases added to all).

Petitioners seek to blur the line between subject matter and viewpoint by trying to place themselves simultaneously on both sides of it. They propose a seemingly simple truth: religion is *both* the subject matter *and* the viewpoint of their speech. *See* Pet. Br. 22-24. But even accepting this premise, the conclusion does not follow

that respondent's exclusion of their meetings violates the Constitution. This Court has made clear that the Free Speech Clause is violated only if the government excludes speech from a limited public forum "*solely* because [it deals] with [an otherwise includible] subject from a religious standpoint." *Lamb's Chapel*, 508 U.S. at 394 (emphasis added); *accord Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker *solely* to suppress the point of view he espouses . . . . " (emphasis added)). Thus, where – as here – there is evidence that the government has excluded speech at least in part for a reason "other than . . . that the presentation would have been from a religious perspective," *Lamb's Chapel*, 508 U.S. at 393-94, the mere fact that a religious perspective is also excluded does not give rise to a constitutional violation.[9]

Were the test otherwise, the government's authority to limit the use of a limited public forum to certain subject matters would become meaningless, because private speakers could always evade the limitations by combining speech on an excluded subject matter with a modicum of speech on an otherwise included subject matter. On petitioners' view of the law, for example, a religious group could require a public school to open itself to religious worship merely by including in the religious service a sermon on a secular subject like child rearing. This cannot be the law, for the government would then have lost its ability to "confin[e] a forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829.

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[9] By referring to the Good News Club's speech as having an "additional layer," the Court of Appeals recognized that religion can be both a subject matter and a viewpoint – and that the Constitution is violated only when religion is excluded *solely* on the basis of viewpoint. Pet. App. A15; *see also id.* at A16 ("We conclude . . . that the Good News Club is doing *something other than simply* teaching moral values." (emphasis added)).

Petitioners incorrectly rely on *Rosenberger* to argue that the First Amendment does not distinguish between a religious subject matter and a religious perspective. *See* Pet. Br. 20-21.[10] The speech in *Rosenberger* was a newspaper – what the Court called "a pure forum for the expression of ideas," 515 U.S. at 844 – and its exclusion by the public university from a Student Activities Fund ("SAF") was based on "editorial viewpoint[ ]." *Id.* at 831; *see also id.* at 844 ("[T]he student publication is not a religious institution, at least in the usual sense of that term as used in our case law . . . . "). Here, by contrast, the Good News Club did not seek meeting space for a journalistic venture, but rather meeting space in which to engage in an evangelizing religious activity involving religious worship, instruction and indoctrination. Respondent's limitation on its forum excluded speech that was inherently part of the religious activity, and not an editorial viewpoint in an exchange of ideas.

Nothing in *Rosenberger* precludes the drawing of an intelligible distinction between religion as a viewpoint and religious worship, instruction and indoctrination as a subject matter, and then constitutionally excluding the latter from a limited public forum. To the contrary, the *Rosenberger* Court merely held that the university had not drawn this distinction in excluding the student newspaper from the SAF:

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[10] Reliance on *Widmar* for this point is even more plainly misplaced. *See, e.g., Amicus Curiae* Brief of Douglas Laycock 15-16. *Widmar* held that a state university's prohibition on use of its buildings "for purposes of religious worship or religious teaching" was an impermissible content-based restriction. 454 U.S. at 267-75. The forum in *Widmar*, however, was an open public forum. Accordingly, the Court did not consider a subject-based exclusion of religious worship and teaching in a more limited public forum, and the Court did not conduct a limited public forum analysis.

> [T]he University *does not exclude religion as a subject matter* but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it *also* provides, *as it did here*, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, *not the general subject matter*, resulted in the refusal [to fund the student newspaper], for the subjects discussed were otherwise within the approved category of publications.

Id. at 831 (emphasis added); *see id.* at 832 ("[T]he University justifies its denial of SAF participation to [the student newspaper] on the ground that the contents . . . reveal an avowed religious perspective.").[11] In the present case, however, Milford Central School did not exclude the Good News Club's speech because – let alone "solely because," *Lamb's Chapel*, 508 U.S. at 394 – religion provided its "specific premise," "perspective," or "standpoint"; instead, the school excluded the Good News Club's speech because religious worship, instruction and indoctrination constituted its subject matter.

Finally, petitioners raise the specter of excessive entanglement between church and state, apparently arguing that allowing a school to make the distinction

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[11] In arguing that *Rosenberger* rejected any legal distinction between religion as a subject matter and religion as a viewpoint, petitioners rely heavily on the fact that the dissent in *Rosenberger* characterized the university's guidelines as excluding "the entire subject matter of religious apologetics." 515 U.S. at 896 (Souter, J., dissenting); *see* Pet. Br. 20-21. However, the disagreement between the majority and the dissent in *Rosenberger* was not over whether the government may constitutionally exclude speech from a limited public forum on the ground that religion constitutes its subject matter, but rather over whether the university had done so. *See* 515 U.S. at 896 (Souter, J., dissenting) ("The Court, of course, reads the Guidelines differently . . . . ").

between religious worship, instruction and indoctrination and speech from a religious perspective is itself constitutionally impermissible. *See* Pet. Br. 24-26. This argument is without merit. Indeed, petitioners' supposed concern is contrary to their own stated position that one cannot draw a subject matter distinction between their speech and that of others. That is, petitioners' entanglement argument presupposes that the school district *can* legitimately distinguish between the subject matter of petitioners' religious speech and the subject matters of other groups' secular speech. Moreover, a broad and categorical exclusion of religious worship, instruction and indoctrination – even when such speech includes a sermon or other expression of religious views on an otherwise includible subject – minimizes the entanglement between church and state, because then the state need not monitor each individual service or lesson plan.

In sum, unlike the school in *Lamb's Chapel* and the university in *Rosenberger*, respondent did not exclude speech on the basis of a religious viewpoint. To the contrary, private individuals and groups were expressly permitted to discuss those subjects otherwise permitted under the school's policy from a religious perspective. *See, e.g.*, J.A. at G6, N14-15. Instead, respondent excluded an entire category of speech from school premises. This limitation was reasonable and was applied without discrimination against any particular viewpoint. Nothing in the Constitution, or in this Court's jurisprudence, forbids that policy.

II. THE ESTABLISHMENT CLAUSE BARS RESPONDENT FROM ALLOWING PETITIONERS' PROPOSED USE OF PUBLIC SCHOOL FACILITIES

Had the Milford Central School embraced the Good News Club as an after-school program for its elementary school students, it would have violated the Establishment Clause. Stated otherwise, the Establishment Clause stands as an independent bar to petitioners' proposed activities on school premises, regardless of the presence

or absence of valid limitations on the use of the forum under the Free Speech Clause. Indeed, the Milford Central School could have justified its exclusion of the Good News Club's meetings *solely* by reference to the compelling state interest in complying with the Establishment Clause. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); *accord Lamb's Chapel*, 508 U.S. at 394-95; *Widmar*, 454 U.S. at 271.

Whatever else it may mean, the Establishment Clause, "at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)) (emphasis added). Allowing impressionable elementary school students to join with petitioners for religious worship, instruction and indoctrination in a school classroom, immediately after school, would violate these prohibitions.

In arguing to the contrary, petitioners emphasize their view that the Good News Club would be meeting on public school premises pursuant to a formally neutral access policy. *See* Pet. Br. 30-39. However, this Court stated only last Term that "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2278 n.21 (2000) (internal quotation marks omitted). In Justice O'Connor's words, "[N]ot all state policies are permissible under the Religion Clauses simply because they are neutral in form." *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment).

Thus, the crucial question for Establishment Clause purposes is whether, notwithstanding Milford Central

School's formally neutral access policy, a reasonable observer would conclude from the Good News Club's meeting on school premises that the government was "lending its support to the communication of a religious organization's religious message." *County of Allegheny*, 492 U.S. at 601; *see also Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) ("[W]hen the reasonable observer would view a government practice as endorsing religion, . . . it is our *duty* to hold the practice invalid."). In light of (1) the young age and cognitive limitations of the Good News Club's targeted audience; (2) the fact that the Good News Club's meetings would take place in a classroom setting immediately after school, when many students attend school-sponsored, after-school programs; and (3) the small number of other outside groups meeting on school premises at the same time, *amici* submit that the answer to this question is plainly yes.

A. A Reasonable Elementary School Student Would Not Understand the Distinction Between Government Speech and Private Speech

First and foremost, the age of the students involved in this case – six to twelve year olds – compels the conclusion that the Milford Central School was required to deny the Good News Club's application to conduct religious worship, instruction and indoctrination on school premises. Indeed, to hold otherwise would represent a marked departure from existing law.

In analyzing whether government action would be perceived as an endorsement of religion, this Court has long placed great emphasis on the age and cognitive maturity of the likely audience. *See, e.g., Lee*, 505 U.S. at 593-94; *Board of Educ. of the Westside Community Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250-51 (1990) (plurality opinion); *Edwards*, 482 U.S. at 583-84; *Ball*, 473 U.S. at 390; *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring in the judgment); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983);

Widmar, 454 U.S. at 274 n.14; *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971); *Schempp*, 374 U.S. at 252-53 (Brennan, J., concurring). In *Widmar*, for example, the Court explicitly relied on the cognitive maturity of university students in concluding that they would be able to distinguish between private speech and government speech. *See* 454 U.S. at 274 n.14. And in *Mergens*, a plurality of the Court extended the reasoning of *Widmar* to high school students: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis . . . . [T]he few years difference in age between high school and college students [does not] justif[y] departing from *Widmar*." 496 U.S. at 250 (plurality opinion) (internal quotation marks omitted).[12]

The *many* years of difference in age between elementary school students and college students, however, *do* justify departing from *Widmar* in this case. *See, e.g.*, *Edwards*, 482 U.S. at 584 n.5 (acknowledging the distinction between university students and younger students and stating that " '[t]his distinction warrants a difference in constitutional results' " (quoting *Schempp*, 374 U.S. at 252-53 (Brennan, J., concurring)). Research in psychology indicates that six- to twelve-year-old children are substantially less cognitively mature than adolescents, and less likely to understand abstract concepts like justice or diversity. *See, e.g.*, Jean Piaget & Bärbel Inhelder, *The Psychology of the Child passim* (1969); Jean Piaget, *The Stages of the Intellectual Development of the Child, in Readings in Child Development and Personality* 291 (Paul Henry

[12] *Lamb's Chapel*, like *Mergens*, involved a high school. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 383-84 (2d Cir. 1992). Moreover, student age was not an issue in that case because the film series on child rearing was directed toward an adult audience. *See id.* at 384.

Mussen et al. eds., 4th ed. 1997).[13] Similarly, psychological research reveals that elementary school students are highly susceptible to peer pressure. *See, e.g.*, Patricia A. Adler & Peter Adler, *Peer Power: Preadolescent Culture and Identity passim* (1998).

This research supports the common-sense assumption that, in the context of programs held immediately after the "formal" school day on school premises, a reasonable elementary school student would not understand the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion). Instead, the objective observer in the position of an elementary school student at the Milford Central School would mistakenly believe that the Good News Club's meetings were sponsored or endorsed by his or her school.[14] Similarly, an elementary

[13] *See also Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1404 & n.11 (10th Cir. 1985) (discussing expert testimony that "a child between the ages of 6 and 11 does not have the cognitive ability to 'appreciate the difference between his point of view and that of somebody else. It's as if he simply assimilates and takes, unthinkingly, what other people have taught to him' ").

[14] The fact that there is no evidence in the record that students were confused during the time the Good News Club met on school premises pursuant to the District Court's preliminary injunction is immaterial. *See* Pet. Br. 38. As Justice O'Connor explained in *Capitol Square*, the endorsement test does not focus "on the actual perception of individual observers, who naturally have differing degrees of knowledge," but on "the perspective of a hypothetical observer." 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment).

school student faced with his or her peers attending the Good News Club's meetings would very well feel coerced by peer pressure to attend and to "receive [Jesus Christ] as [his or her] Savior." Lodging at BB24. Those students forbidden to attend by their parents would correspondingly feel excluded, different and diminished within their own school.

These conclusions are further reinforced by the near uniform judgments of courts – including this Court – and of Congress. In the Establishment Clause context alone, courts have routinely taken note of the cognitive limitations of young children. *See, e.g., Edwards*, 482 U.S. at 583-84; *Ball*, 473 U.S. at 390; *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n.* (4th Cir. 1998); *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1509 & n.18 (8th Cir. 1994); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378-79 (9th Cir. 1994); *Bell*, 766 F.2d at 1404-05 & n.11. Courts have noted the same cognitive limitations in other legal contexts as well. *See, e.g.*, 3 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 16.8 & n.18 (2d ed. 1986) (discussing courts' treatment of children in the tort law context); Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 4.11 (2d ed. 1986) (same in the criminal law context); 5 *Williston on Contracts* ch. 9 (4th ed. 1993) (same in the contract law context).[15]

Similarly, Congress specifically dropped elementary schools from coverage under the Equal Access Act, 20 U.S.C. §§ 4071-4074, in the wake of vociferous objections

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[15] This case law undermines the argument of some *amici* that the "reasonable child" is "a creature unknown to the law." *Amicus Curiae* Brief of Child Evangelism Fellowship, Inc. *et al.* at 9. Indeed, the "reasonable child" is a creature *well* known in tort law. *See, e.g., Restatement (Second) of Torts* § 464, at 507 (1965); *see also Capitol Square*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "the applicable observer [for Establishment Clause purposes] is similar to the 'reasonable person' in tort law").

from legislators that elementary school students would be unable to distinguish private speech from school-sponsored speech. *See, e.g.*, S. Rep. No. 98-357, at 43-49 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2389-94; *see also* 130 Cong. Rec. S19231 (daily ed. June 27, 1984) (statements of Sen. Metzenbaum and Sen. Hatfield); *id.* at H20934 (daily ed. July 25, 1984) (statement of Rep. Schumer); *cf. Mergens*, 496 U.S. at 251 (plurality opinion) (noting that the Court does "not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations"). A failure to recognize a distinction between this case and *Widmar* and *Mergens* would mark a significant retreat from these considered judgments about the cognitive limitations of young children.

Petitioners' assertion that elementary school students' impressionability is a "two way street" is wholly without merit. *See* Pet. Br. 35; *see also* Laycock Br. 26-27. First and foremost, it finds no support in the jurisprudence of this Court. To the contrary, as the cases cited above demonstrate, this Court has long recognized that the "union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Ball*, 473 U.S. at 390. Second, it simply defies common sense to argue that elementary school children would infer from the fact that the Good News Club meets away from school – as the Club once did, in a local church, *see* Pet. App. H2, ¶ 12 – that the Milford Central School is hostile toward religion. To draw this conclusion, a student would have to be aware, *at a minimum*, that the Good News Club sought to meet at the school; that the school did not permit the Good News Club to do so; that this decision was made because the Good News Club is religious; and that the school allows other, nonreligious groups and groups merely with a religious perspective to meet at school. Only a truly *remarkable* elementary school student – not the benchmark *reasonable* student – would be aware of these facts, let alone draw the insupportable inference from

these facts that the Milford Central School is hostile toward religion. Such a remarkable student would no doubt also be aware that the Establishment Clause mandated the school's decision, and thus that any such inference was without foundation.

The age of the students in this case also undermines petitioners' argument that the Milford Central School could counteract any misimpression of endorsement through some sort of disclaimer. *See* Pet. Br. 35-36. To be sure, a plurality of this Court reasoned in *Mergens* that the school board's "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students." 496 U.S. at 251 (plurality opinion). However, the plurality's reasoning explicitly rested on the assumption that students would "reasonably understand" a statement from the school that its official recognition of the club "evinces neutrality toward, rather than endorsement of, religious speech." *Id.*; *see also Capitol Square*, 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "the reasonable observer . . . would certainly *be able to read and understand* an adequate disclaimer" (emphasis added)). Where, as here, the audience is incapable even of reasonably understanding such a statement – indeed, where such a statement would likely cause additional confusion among the young children targeted – the "fear of a mistaken inference of endorsement" is not self-imposed, but rather unavoidable.

B. The Good News Club's Meetings Would Have the Appearance of a School-Sponsored, After-School Program

The probability that a reasonable elementary school student would believe that the Good News Club meetings were sponsored by the Milford Central School would be greatly enhanced by the fact that those meetings would take place in a classroom setting immediately after the end of the formal school day. This factor is particularly salient in today's world because many elementary school students

are effectively, if not actually, required to "attend" school immediately after the "formal" school day. Accordingly, allowing the Good News Club to meet at that time and in that setting would be, for Establishment Clause purposes, tantamount to allowing a religious group to conduct religious worship, instruction and indoctrination *during school hours*.

This Court has long been "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583-84; *see id.* at 584-85 (citing cases in which the Court has invalidated statutes "which advance religion in public elementary and secondary schools"); *see also Lee*, 505 U.S. at 592. Public schools hold a unique place among government institutions in Establishment Clause jurisprudence. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary." *Edwards*, 482 U.S. at 584.

The Court's vigilance has been particularly pronounced with respect to religious activities that take place during the school day because such activities raise two related, but distinct, concerns. First, as a result of mandatory attendance requirements, the emulation of teachers and peer pressure, such activities pose a high "risk of compulsion." *Lee*, 505 U.S. at 596; *see Edwards*, 482 U.S. at 584; *Wallace*, 472 U.S. at 60 n.51; *Schempp*, 374 U.S. at 252-53 (Brennan, J., concurring); *McCollum*, 333 U.S. at 209-10. Second, because such activities blur the line between publicly sponsored school activities and privately sponsored religious activities, they heighten the probability that a reasonable observer in the position of a student will believe that the government is endorsing religion. As the Court explained in *Ball*, "In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school'

classes, even if the latter were successfully kept free of religious indoctrination." *Ball*, 473 U.S. at 391.

This case implicates both of these important concerns. The Good News Club proposes to meet in a public school classroom *immediately* after the end of the formal school day, when students remain on school grounds by virtue of the state's "compulsory education machinery." *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1046 (5th Cir. 1982). Thus, this case is a far cry from *Lamb's Chapel*, in which a religious group sought to use a public school auditorium or gymnasium between the hours of *7 p.m. and 10 p.m.* for the purpose of showing a *film series to adults. See Lamb's Chapel*, 959 F.2d at 384; *see also Lamb's Chapel*, 508 U.S. at 395 (relying in part on the fact that the film series would not have been shown "during school hours" in concluding that the Establishment Clause was not violated). Here, unlike in *Lamb's Chapel*, an objective elementary school student would have felt peer pressure to attend the religious group's meetings – to join his or her classmates as one of the "saved" by receiving Jesus Christ as the Savior, not to mention also wanting to receive candy and prizes – and would reasonably have believed that the meetings were sponsored by the school in which they were held.

To hold that the school day's ending bell alone makes a difference for Establishment Clause purposes would, in today's world, be "formalistic in the extreme." *Lee*, 505 U.S. at 595; *see id.* ("Law reaches past formalism."); *see also Santa Fe*, 120 S. Ct. at 2280. Recent studies reveal that almost 30% of public elementary schools and combined primary-secondary schools now sponsor school-based, extended-day programs. *See, e.g.*, National Center for Education Statistics, *Schools Serving Family Needs: Extended-Day Programs in Public and Private Schools* (U.S. Dep't of Educ. Feb. 1997). *See generally* Patricia S. Seppanen et al., *National Study of Before & After School Programs* (U.S. Dep't of Educ. 1993). Moreover, with the increasing labor force participation of mothers with young children and the increasing numbers of single-parent families, the need for – and,

consequently, the availability of – such programs is only likely to grow. *See, e.g.*, National Center for Education Statistics, *supra*. Since the elementary school students who attend these programs are incapable of leaving the school premises on their own, many public school students are effectively – if not actually – required to "attend" school following the end of the "formal" school day.[16] The Good News Club in all likelihood wants to meet immediately after the final bell sounds in order to include as many of these young students as possible in its evangelical meetings. For these students, the Good News Club meetings in public school classrooms would be no different than religious classes in public school classrooms during (*i.e.*, in the final period of) the "formal" school day. Just as this Court held the latter unconstitutional in 1948, *see McCollum*, 333 U.S. at 209-10, it should leave no doubt that the Good News Club meetings would be unconstitutional today.

C. The Good News Club Would Be One of Only a Few Private Groups Meeting on Public School Premises

The presence or absence of a broad spectrum of private groups in a government forum is another important factor in measuring a religious group's access to the forum against the principles of the Establishment Clause. Thus, for example, in *Rosenberger*, the religious student newspaper "compete[d] with 15 other magazines and

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[16] In *Mergens*, the plurality found constitutionally significant the Equal Access Act's application only to student meetings during what is clearly "noninstructional time." 496 U.S. at 251 (plurality opinion) (citing 20 U.S.C. § 4071(b)). For high school students, who not only can organize their own meetings but also are always able on their own accord to leave school premises after school, the distinction between "instructional time" and "noninstructional time" is a meaningful one. The same cannot be said for elementary school students.

newspapers for advertising and readership," 515 U.S. at 850 (O'Connor, J., concurring); in *Capitol Square*, the public square was a "space in which a multiplicity of groups, both secular and religious, engage[d] in expressive conduct," 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment); in *Lamb's Chapel*, the school property at issue was "heavily used by a wide variety of private organizations," 508 U.S. at 392; in *Mergens*, there was a "broad spectrum of officially recognized student ciubs" and "students [were] free to initiate and organize additional student clubs," 496 U.S. at 252 (plurality opinion); and in *Widmar*, "the forum [was] available to a broad class of nonreligious as well as religious speakers" – over 100 recognized student groups in all, 454 U.S. at 274.

In each of these cases, the vibrant nature of the government forum weighed heavily against any appearance of government endorsement. As Justice O'Connor explained in *Rosenberger*, "The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. . . . Given this wide array of . . . viewpoints . . . , any perception that the University endorses one particular viewpoint would be illogical." 515 U.S. at 850 (O'Connor, J., concurring); *see Mergens*, 496 U.S. at 252 (plurality opinion) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."); *Widmar*, 454 U.S. at 274 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

In the present case, by contrast, any perception that respondent endorses one particular group meeting on school premises after school would be not only logical, but well-nigh inescapable. An elementary school is not, like a university or a public square, a forum designed for robust intellectual debate and inquiry. Rather, it is "by . . . nature and historical mandate a protected enclave for the regulated nurture of its students." *Quappe v. Endry*, 772 F. Supp.

1004, 1011 (S.D. Ohio 1991), *aff'd*, 979 F.2d 851 (6th Cir. 1992) (table). Consistent with this, *only three* private groups apart from the Good News Club have met on respondent's premises. *See* Pet. App. E4, ¶ 21; Lodging at Y1-2, Z1, AA3-4.[17] Thus, there is no "broad spectrum" of officially sanctioned private groups meeting at the Milford Central School immediately after the end of the "formal" school day. *Mergens*, 496 U.S. at 252 (plurality opinion). Instead, the Good News Club would be one of only a few such groups, and the danger that its message would be perceived as sponsored or endorsed by the school would be grave indeed.

D. To Allow the Good News Club to Meet at the Milford Central School Would Constitute an Unprecedented Erosion of Establishment Clause Values

This Court has repeatedly emphasized, in both word and example, that "[e]very government practice must be judged in its unique circumstances" to determine whether it constitutes an endorsement of religion. *Santa Fe*, 120 S. Ct. at 2282 (internal quotation marks omitted); *accord Lee*, 505 U.S. at 597. Only last Term, the Court cautioned that in making such determinations, it is important to "keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded." *Santa Fe*, 120 S. Ct. at 2281 (internal quotation marks omitted). In light of the

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[17] Moreover, it is not clear from the record when these other private groups meet on school grounds – that is, whether they meet immediately after school, as the Good News Club proposes to do, or whether they meet in the evening or on weekends. Thus, it may be that the Good News Club would be the *only* outside group meeting on school grounds immediately after the "formal" school day. *Cf. Mergens*, 496 U.S. at 252 (plurality opinion) ("To the extent that a religious club is merely one *of many* different . . . clubs, students should perceive no message of government endorsement of religion." (emphasis added)).

unique circumstances discussed above, and the fundamental role that public schools play "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests," *Ambach*, 441 U.S. at 76, allowing the Good News Club to extend the school day for elementary school children by offering religious worship, instruction and indoctrination on public school grounds would result in an unprecedented erosion of Establishment Clause values that would reverberate well beyond this particular case.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari
To The United States Court Appeals
For The Second Circuit

BRIEF OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. The interest of the *amicus curiae*[1] is as follows.

The New York State School Boards Association ("NYSSBA") is a not-for-profit membership corporation incorporated under the laws of the State of New York located in Albany, New York. NYSSBA's membership consists of approximately 697 or 94 percent of the public school districts in New York State, including the Respondent herein. NYSSBA has often appeared as an *amicus curiae* in federal and state court cases affecting educational policy, with a particular interest in those involving separation of church and state issues. Notably, the *amicus curiae* has filed briefs before this Court in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) and *Mitchell v. Helms*, 121 S.Ct. 2530 (2000). The Association's General Counsel, Jay Worona, has presented oral argument before this Court in his capacity of Counsel of Record for the Respondents in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994).

SUMMARY OF THE ARGUMENT

This Court has long held that where government property is not a traditional or designated public forum,

[1] This brief was written entirely by counsel for the *amicus* and not in any part by counsel for either party. No person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

government may restrict public access thereto "based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985), *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993)). There is no dispute that the Milford Central School ("Milford" or "the District") has established a limited public forum regarding community use of its school facilities. (*Good News Club v. Milford Central School*, 203 F.3d 502, 509 (2nd Cir. 2000); Petitioners' Brief at p. 16). Instead, the present case concerns the constitutional validity of Milford's determination to deny the Good News Club and others associated with it (collectively "the Club"), an application for the use of school premises to conduct activities that include the teaching of Bible verses to young elementary school children, the memorization of passages from Scripture by those children, and their participation in prayer at the start and close of the Club's meetings. (Lodging at W1; Joint Appendix at F3-F5; Petitioners' Brief at pp. 7-9). More specifically, this Court is asked to determine whether the exclusion of such activities constitutes viewpoint discrimination under equal access rights guaranteed by the Free Speech Clause of the First Amendment to the United States Constitution.

Despite the Club's assertions to the contrary, Milford's refusal to grant the Club access to the use of its school facilities was not an act of viewpoint discrimination. The Club's activities at issue herein do not fall within the perimeters of Milford's limited public forum.

Neither do they constitute a viewpoint on matters otherwise within that forum. In addition, it is particularly reasonable to exclude from a limited public forum established by a public school district proselytizing activities of the type at issue herein that are conducted by a private group with very young impressionable public school students ages 6-12 as the intended target audience. Milford's actions were not motivated by hostility toward religion.

As acknowledged by this Court, there is a "myriad [of] subtle ways in which the Establishment Clause can be eroded," (*Doe v. Santa Fe Independent School Dist.*, 120 S.Ct. 2266, 2281 (2000) and *County of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989) both citing *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring), and "the law reaches past formalism" (*Lee v. Weisman*, 505 U.S. 577, 595 (1992)). Accordingly, Milford's decision to deny the Club access to its facilities for the purpose of conducting the activities at issue herein was properly justified by Establishment Clause concerns regarding the impression upon the minds of young elementary school children, as young as age six, that a public school is also a place of worship and religious evangelization.

Finally, contrary to the arguments advanced by the Club and its *amici*, there is no excessive entanglement caused by a school district's actions in determining whether a particular set of activities constitutes a religious viewpoint or evangelizing speech. Followed to its logical extension, the Club's argument would of necessity require that government confer upon religion a preferred status not otherwise countenanced by this Court's Establishment Clause jurisprudence.

ARGUMENT

I. The Milford Central School District Did Not Violate The Free Speech Rights Of The Good News Club When It Denied The Club Access To The Use Of Public School Facilities.

It is undisputed that Milford has established a limited public forum (*Good News Club*, 202 F.3d at 509; Petitioners' Brief at p. 16). This Court has acknowledged repeatedly that where government property is not a traditional public forum "devoted to assembly and debate" either "by long tradition or by government fiat" or a designated public forum opened intentionally "for indiscriminate public use for communicative purposes" (*Cornelius*, 473 U.S. at 802; *Lamb's Chapel*, 508 U.S. at 392-93), government may restrict public access thereto "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (*Lamb's Chapel*, 508 U.S. at 392-93; *see, Cornelius*, 473 U.S. at 806). Milford's forum allows private groups the use of its school facilities for "instruction in any branch of education, learning or the arts" and "the welfare of the community". (Petitioners' Brief at p. 16). According to the Club, the activities for which it sought to use Milford's facilities involve instruction on moral values from a religious viewpoint. (Petitioners' Brief at p. 17). Therefore, the Club alleges that Milford's denial of its application constituted viewpoint discrimination in violation of the Club's rights of equal access under the Free Speech

Clause of the Federal Constitution. (Petitioners' Brief at pp. 17-22).

To establish an equal access violation in the present case, the Club must show that its activities indeed constitute instruction or a viewpoint on matters otherwise permissible within Milford's forum. (*Lamb's Chapel*, 508 U.S. at 392-94). However, the teaching of Bible lessons, memorization of Scripture, a challenge and invitation to "establish[ ] a relationship with Christ" (Petitioners' Brief at p. 8), and the recitation of prayer at the start and close of the Club's meetings, (Joint Appendix at F4; Petitioners' Brief at p. 8), constitute proselytization and religious worship rather than mere instruction or a viewpoint. (*See Good News Club*, 202 F.3d at 510-11). The *amicus* respectfully submits that, under any standard, proselytization evokes exhortation to adopt or maintain adherence to a particular belief or system of beliefs. Instruction entails a factual, objective presentation about a specific topic. A viewpoint involves a perspective. The terms only become blurred "by the active imagination of hypothesized application." (*Campbell v. St. Tammany's School Board*, 206 F.3d 482, 485 (5th Cir. 2000), *rehearing en banc denied*, 231 F.3d 937 (5th Cir. 2000)). It is a tortured interpretation of language to characterize prayer as a religious viewpoint on the subject of moral values. If one concludes that, by definition, prayer is nothing more than a religious viewpoint, then the exclusion of prayer as a viewpoint on any topic otherwise permitted within a limited public forum automatically would result in unlawful viewpoint discrimination. The same would be true regarding the exclusion of activities involving the memorization of Scripture

and the inculcation of religious beliefs through the study of Bible passages alleged to be a viewpoint on any topic within the forum.

Nonetheless, the Club and its *amici* argue that Milford's decision to exclude the Club from its forum constitutes a violation of the Club's equal access rights because this Court's prior decisions in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) and *Widmar v. Vincent*, 454 U.S. 263 (1981), elevate speech "with an evangelistic component" out of "second-class status" and accord it the same protection as other forms of private speech. (Petitioners' Brief at pp. 20-21). However, "[p]rotected speech is not equally permissible in all places at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their rights to free speech . . . " (*Cornelius*, 473 U.S. at 799). Therefore, the *Widmar* and *Rosenberger* decisions, which arise out of the university campus instead of an elementary or secondary school environment, are not dispositive of this case. The issue still remains whether Milford's limited public forum forecloses access for the type of proselytizing activities at issue herein. For the reasons set forth throughout this brief, it does.

In this context, it is also important to assess the reasonableness of excluding proselytizing activities conducted by private groups on public school premises targeted at elementary school children in relation to the special characteristics and sensibilities which this Court has acknowledged to exist within a public school environment. (*County of Allegheny*, 492 U.S. at 620 fn. 69). It was mindful of these special attributes that when Congress passed the Equal Access Act, 20 U.S.C. §§ 4701 *et*

seq., it allowed student Bible clubs to meet on public school premises only at the high school level. Furthermore, most relevant to the issues before this Court, Congress also required as a condition for the exercise of equal access rights under the Act that such clubs be student-initiated and student-led, and not be "directed, controlled, conducted or regularly attended by non-school persons." (20 U.S.C. § 4701(c)(1),(2),(4) and (5); *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 236 (1990)).

As such, it is similarly reasonable for a public school district, exercising its legislative authority to establish a limited public forum, to exclude from the forum activities that are targeted at elementary or secondary school age children and that are organized, directed, controlled, conducted and regularly attended by non-school persons for the purpose of evangelizing those children. A ruling in favor of the Club reaches beyond the limits established by Congress and recognized by this Court in *Mergens*. It is equally noteworthy that the activities at issue in both the *Widmar* and *Rosenberger* cases, relied upon by the Club and its *amici*, involved student-organized activities at the university level. They did not involve outside private groups, or impressionable students, as young as age six, as the target of outside private groups.

Finally, Milford adopted its "Community Use of School Facilities" policy on August 26, 1992 (Joint Appendix at F2), subsequent to a decision by the U.S. Court of Appeals for the Second Circuit in a case entitled *Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York*, 852 F.2d 676 (2nd Cir. 1988). In that case, a fundamentalist Christian church applied for permission

to use school facilities for religious worship and instruction, arguing among other things, that its proposed use of school facilities fell within the language of New York Education Law § 414(1)(a) which, like Milford's policy, authorizes the use of public school facilities by outside groups "for the purpose of instruction in any branch of education in learning or the arts." The Second Circuit determined that: "[T]he thrust of the statute is to promote knowledge, rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs." (852 F.2d at 680).

Therefore, at the point in time when Milford adopted its policy, it was not at liberty to interpret Education Law § 414(1)(a) differently than the Second Circuit had interpreted it, and it could not have intended the provision in its policy which mirrored the language of § 414(1)(a) to authorize anyone to use its facilities to engage in religious instruction. As such, Milford framed the boundaries of its limited public forum in conformity with the law of the Second Circuit and its actions cannot be said to have been motivated by any hostility toward religion.

Some might argue, of course, that this Court's *Lamb's Chapel* decision supersedes the Second Circuit's statutory interpretation of Education Law § 414(1)(a) in *Deeper Life*, but to do so one must conclude that there is no distinction between religious instruction and worship and a religious viewpoint. However, the *amicus* submits that this Court's ruling in *Lamb's Chapel* does not lead inexorably to that conclusion. Rather, whether it is constitutionally permissible for the host of a limited public forum to frame the boundaries of the forum in a way that draws a distinction between religious instruction and worship

as a subject matter and a religious viewpoint on a subject matter to which the forum already has been opened, is precisely the question presented by this case. This Court has not expressly addressed the issue of whether religious worship and proselytizing activities are mere viewpoints, but it does appear to have acknowledged a distinction between religion as a subject matter and religion as a viewpoint. (*See Lamb's Chapel*, 508 U.S. at 390-94 and *Rosenberger*, 515 U.S. at 828-29).

In this context, contrary to the argument advanced by the Club and its *amici*, it is not unworkable to make such a distinction. Moreover, to adopt a rule that would foreclose the host of a limited public forum from regulating speech and activities regardless of the nature and extent of the activity, once a speaker alleges it is presenting a "religious viewpoint" on a subject matter already within the forum, would elevate religion to a preferred status which this Court's Establishment Clause jurisprudence would not countenance.

II. Establishment Clause Concerns Justified Milford's Decision To Deny The Club's Request To Meet On School Premises.

As set forth more fully above, Milford did not engage in any act of viewpoint discrimination when it excluded the Club from accessing school premises for its requested usage. However, even assuming *arguendo* that such exclusion was viewpoint discriminatory, the *amicus* respectfully submits that such exclusion was justified by the compelling state interest of avoiding a violation of the

Establishment Clause. (*See, e.g., Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995); *Lamb's Chapel*, 508 U.S. at 394-95; *Widmar*, 454 U.S. at 271).

The *amicus* recognizes that this Court's previous decisions finding Establishment Clause violations to exist occurred in the context of school sponsored activities whether they be during or after the school day, (*see, e.g., McCollum v. Board of Educ. of School Dist. No. 17*, 333 U.S. 203 (1948); *Engle v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Stone v. Graham*, 449 U.S. 39 (1980); *Lee v. Weisman*, 505 U.S. 577, *supra*; *Doe v. Santa Fe Independent School Dist.*, 120 S.Ct. 2266, *supra*), and not in the context of private speech occurring on school premises. Nevertheless, the *amicus* respectfully submits that this Court, in its previous decisions, did not necessarily set up a litmus test precluding school districts from demonstrating the existence of an Establishment Clause violation simply because the requested usage of school premises was by an outside group.

In the present case, there is no dispute in the Record that the Club applied for access to meet with young elementary age students immediately after the school day. (Joint Appendix at P29). In fact, it is quite conceivable that while the Club's activities would be getting underway, numerous children not otherwise associated with the Club, who might be passing by in the hallway outside of the room in which the Club would meet, would hear the Club's messages as presented by adults. Such impressionable young students could certainly gain the impression that the Club's religious messages of indoctrination is being presented by Milford officials.

Indeed, before and after school programs are becoming more and more commonplace in school districts throughout the nation, and it is not uncommon for children to remain upon the premises of their school buildings well after the close of the school day.

Previously, in *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, *supra*, this Court upheld the constitutionality of the Equal Access Act which requires public high schools to allow student religious and political clubs to meet on the same basis as other non-curriculum-related activities. Nevertheless, the Court recognized that the Act was limited to secondary grade students who were less impressionable and that such club activities could not be directed by an outside group or person. Indeed, college and university campuses are quite different from elementary settings with respect to the ability of college age students to discern differences between private speech and speech which is governmentally directed and/or sponsored. (*See Widmar*, 454 U.S. at 274 fn. 14).

Although the *amicus* recognizes that the Club's request in the present case does not fall under the Equal Access Act, concerns regarding the impressionability of young elementary age students should nevertheless be recognized as supplying Milford the requisite compelling state interest to avoid an Establishment Clause violation. Indeed, whether this Court applies its often criticized *Lemon* test (*see Lemon v. Kurtzman*, 403 U.S. 602 (1971)), an "endorsement" test (*see Agostini v. Felton*, 521 U.S. 203 (1997); *County of Allegheny*, 492 U.S. at 592-94; *Lynch v. Donnelly*, 465 U.S. 668, 692-94 (1984) (O'Connor, J., concurring)), or a "*coercion*" test, heretofore not yet adopted

in this context (*see County of Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part)), it is clear that school districts across the nation, including Milford in the present case, can clearly demonstrate the existence of a compelling state interest to prevent young impressionable students, at a time immediately at the conclusion of their school day from perceiving their school to be fostering religious indoctrination.

The Club maintains that a scenario which is just as likely to occur, if the decision of the Court below is affirmed, is that young impressionable children will gain the belief that their school district is hostile towards religion. (Petitioners' Brief at p. 35). However, in the present case, Milford maintained its actions in conformity with the Establishment Clause and not in violation of it by precluding the Club from meeting immediately after the school day for a purpose which would clearly communicate to young elementary school age children that their houses of learning are also houses of worship and indoctrination. The *amicus* respectfully submits that the suggestion that elementary age children would perceive their schools as being hostile towards religion simply by being required to secure messages of religious indoctrination in other facilities including churches and synagogues is without merit.

Indeed, this Court in *McCollum*, 333 U.S. 203, *supra*, recognized that Establishment Clause impressionability problems would arise if children were released to secure religious instruction upon the premises of their own school buildings. Indeed, although this Court in *Zorach v.*

Clauson, 343 U.S. 306 (1952), did not find it constitutionally troubling for children to be released during the school day for religious instruction, such instruction was to be secured only off the premises of the public school building. Although it is certainly true that both *McCollum* and *Zorach* involved release time activities proposed to occur during the school day, the facts of the instant case, present equally troubling Establishment Clause problems.

As set forth above, a reversal by this Court of the decision below will place the children involved in this case in the position of witnessing acts of religious indoctrination at a time in their lives when they will not be able to discern what is school sponsored and what is not. Accordingly, the concern regarding impressionability of young children and Establishment Clause violations is most certainly in existence under the facts of this case.

Indeed, this Court as recently as this past year restated that the Constitution requires "that we keep in mind 'the myriad subtle ways in which Establishment Clause can be eroded.'" (*Doe v. Santa Fe Independent School Dist.*, 120 S.Ct. at 2281 (citations omitted)). It is unquestionable that the Establishment Clause will certainly be eroded if this Court takes away the authority on the part of school districts to shield impressionable children from messages of religious indoctrination simply because such messages are scheduled to take place after the school day.

This Court has previously recognized that "the law reaches past formalism." (*Lee v. Weisman*, 505 U.S. at 595,

supra). Indeed, it would be a most "formalistic" distinction to find the existence of Establishment Clause concerns to only arise in the context where schools are directly involved in sponsoring certain activities or only when such activities occur during the school day notwithstanding the actual effect upon the minds of impressionable students.

III. Milford Did Not Become Excessively Entangled With Religion In Violation Of the Establishment Clause When It Asked The Club For A Description Of Its Intended Use Of School Facilities And For Supplemental Information Elaborating On Those Intentions.

When public school districts open their facilities to designated uses by outside groups, they necessarily inquire about each group's proposed use of school facilities to determine whether the use is consistent with district policy. The Club's argument that the act of inquiry itself excessively entangles public schools with religion cannot be reconciled with this Court's prior rulings.

In *Agostini v. Felton*, 521 U.S. 203, this Court made clear that:

> Not all entanglements . . . have the effect of advancing or inhibiting religion . . . Entanglement must be "excessive" before it runs afoul of the Establishment Clause. (*Id.*, at 233).

In so stating, this Court expressly referred to the case of *Bowen v. Kendrick*, 487 U.S. 589 (1988), involving a challenge to the Adolescent Family Life Act (AFLA) which authorized federal grants to both public and nonprofit

private organizations for services and research in the area of premarital adolescent sexual relations and pregnancy. According to this Court, *Bowen* did not involve excessive entanglement even though AFLA requires that government **"review[ ] the adolescent counseling program** set up by the religious institutions that are grantees, **review [ ] the materials used by such grantees**, and monitor[ ] the program by periodic visits." (*Agostini*, 521 U.S. at 233 (citing, *Bowen*, 487 U.S. at 615-17), (emphasis added)).

In the instant case, the Club completed a "Use of School Facilities Request Form" on which it described the purpose of its proposed use of school facilities as follows: "A Good News Club is a group of boys and girls meeting one hour a week for a fun time of singing songs, **hearing a Bible lesson and memorizing scripture**." (Lodging at W1 (emphasis added)). After reviewing the application, Milford's Superintendent denied the Club use of school facilities, finding the Club's "proposed use to be the equivalent of religious worship, which is prohibited under our District policy, rather than the expression of religious views or values on a secular subject matter." (Joint Appendix at H1-H2). Thereafter, in response to Milford's request for further information, the Club's attorney indicated that:

> The Club's activities are run by Ms. Darlene Fournier. The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members'

> lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and Bible verses for memorization. (Joint Appendix at J1-J2).

Milford also asked the Club to furnish the written materials that it proposed to use as part of its lessons. (Joint Appendix at F3-F4).

Milford reviewed the Club's program and the supplemental materials submitted by the Club, just as the government in *Bowen* reviewed the counseling programs set up by the religious institutions in that case. Thereafter, it again denied the Club's application for the use of school facilities. (Joint Appendix F6-F7).

In the process of defending its position in litigation, Milford deposed the Reverend Stephen Fournier. According to the Club, Milford asked "intrusive, probing questions about religious elements of Club Activities," (Petitioners' Brief at p. 25), thereby implying that Milford was unable to distinguish between viewpoint and subject matter without deposing the Reverend. However, the facts of this case do not bear out that claim.

It is undeniable that Reverend Fournier's deposition testimony amplified the details of the Club's proposed use of school facilities above and beyond the information that the Club initially supplied on the application form. For example, the Reverend Fournier admitted in his deposition that 6-12 year olds who attend Club meeting are invited by their instructor, in this case Darlene Fournier, to "come to know Jesus Christ as their Savior" (Joint Appendix at P69) and that the invitation is "offered to the class as a whole . . . " (Joint Appendix at P71).

However, to the extent that Reverend Fournier's deposition testimony supplied the courts below with any hindsight, the lesson of that hindsight is that Milford got it right the first time. Milford did not need to depose the Reverend Fournier to ascertain that the Club intended to engage in religious worship and instruction. Milford was able to determine from an examination of the application form and from a minimally intrusive request for, and examination of, additional information supplied by the Club, that the Club's proposed use of school facilities violated district policy against using school facilities for religious worship and religious instruction.

The Club's argument that Milford cannot distinguish between religious worship or religious instruction vis-a-vis a religious viewpoint on a secular theme without unconstitutionally entangling itself with religion is simply an extension of the Club's argument that it is difficult if not impossible for Milford to make this distinction at all. Under this reasoning, the only way for Milford to disentangle itself from religion would be to disengage from the process of inquiry altogether whenever the applicant proposes to present a religious viewpoint, which would elevate religion to a sacrosanct status in Milford's limited public forum.

No such result is required under the facts of this case, because Milford did not excessively entangle itself with religion simply by asking the Club to describe its intended use of school facilities and to supply additional information elaborating on its intentions. The inquiry engaged in was limited to that which was necessary to preserve the boundaries of Milford's limited public forum.

CONCLUSION

Milford's exclusion of religious worship and religious instruction from the range of permissible uses of school facilities by outside groups is constitutionally permissible, because it is reasonable in light of the purpose served by the schoolhouse as a limited public forum, and viewpoint neutral. Even if this court finds that Milford engaged in viewpoint discrimination by denying the Club access to its limited public forum for the purpose of engaging in religious worship and religious instruction, Milford had a compelling justification for excluding the Club's activities based on Establishment Clause concerns.

Petitioners' argument that Milford excessively entangles itself with religion by making a limited inquiry into each applicant's proposed use of school facilities is wholly without merit.

Therefore, the *amicus* respectfully submits that the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE GOOD NEWS CLUB; ANDREA FOURNIER; and DARLENE FOURNIER,

Petitioners,

—v.—

MILFORD CENTRAL SCHOOL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

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January 2001

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INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic, political and religious rights of American Jews, and all Americans. It has taken a particular interest in the Religion Clauses of the First Amendment and, has filed briefs in most of the cases reaching this Court under those Clauses.

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. The record was compiled with recent controlling decisions of the Second Circuit in view. Both the School District in passing on Good News' application and counsel defending its actions understandably did not undertake any broader defense of Good News' exclusion. However, numerous other factual and legal defenses do exist and should not be ignored because under controlling law it was unnecessary to reach those issues.

2. Contrary to Petitioner's model, speech is not either private or public. Although usually the identity of the speaker will suffice to determine if speech is to be attributed to the government for Establishment Clause purposes, there are cases such as this one, *Capital Square Review & Advisory Board v. Pinette*,515 U.S. 753 (1999), *County of Allegheny v. ACLU*, 492 U.S. 573 (1991) and *Board of Education v. Mergens*, 496 U.S. 226 (1990), where the reasonable observer will believe that it is the state, not the private party, speaking, even though the actual speaker is private. As with state action generally, the complexity and ambiguity of relations between private and public actors yields no bright line between public and private. Adoption of Petitioners' bright line would be unfaithful both to this Court's precedents and to reality.

3. The Second Circuit was faithful to this Court's precedents both in classifying an exclusion of all religious speech as a subject matter, not viewpoint based, decision, and in permitting a designated forum to exclude speech based on its subject matter. *Lamb's Chapel v. Center Moriches* UFSD, 508

U.S. 384 (1993) and *Rosenberger v. Rector*, 515 U.S. 819 (1995), both retain the distinction between subject matter and viewpoint based distinctions. Other circuits agree with the Second Circuit, post *Rosenberger*.

4. That distinction is sensible and workable. Common human practice groups related ideas into subjects. Intelligible conversation would be impossible without the ability to classify ideas as related. The use of subject matter classification is routine (*i.e.*, in grouping college courses into departments), and in no way is a hindrance to speech.

5. Subject matter restrictions are not automatically acceptable. They must be reasonable, necessary to preserve the forum for its intended purposes, and not exclude substantially more speech than necessary. All exclusion of religious speech will not satisfy that standard. Had Good News sought Milford's building at nights or on weekends, it would not have been reasonable to exclude it on the basis of the subject matter of its speech, there being then no plausible claim of confusion of the Club with the School.

6. Contrary to Petitioners' claim, nothing in the record supports the claim that the ostensibly content based exclusion was in fact a viewpoint based one. In particular, Respondent was entitled to grant or withhold access based on Petitioners' application, which described their purpose as religious. There is no basis in law or reason to impose on government entities the burden of determining whether any of possible multiple characterizations of speakers' content overlaps with the viewpoints actually expressed by other users. Petitioners' claim that, notwithstanding their application describing only pure

religious instruction, they too were teaching about moral and spiritual values is untenable. Not only did they not say anything of the sort in their application, but a review of materials used in the Club show only religious teaching, not secular subjects taught from a religious point of view.

7. Respondent's concerns about confusion in the minds of first through sixth graders were substantial. The Club would meet on school property immediately after school, and conduct activities which were not unlike regular school classes.

These claims may, as some of our fellow *amici* argue, amount to a constitutional violation had Good News been granted access. This case does not require the Court to go so far. Nothing in the Court's cases requires a party burdened to prove a substantial or compelling interest that the interest is of constitutional magnitude. Compelling (or substantial) interest analysis is not an exercise in reconciling conflicting constitutional provisions, but tempering respect for rights with the practical necessities of governance. Those necessities incorporate room for judgment by school officials about how much overlap between school and church activities is educationally desirable.

Petitioners' argument that private speech can never justify special restrictions on religious speech would invalidate those provisions of the Equal Access Act, 20 U.S.C. § 4071, which impose special restrictions on religious clubs, and which limit the Act's provision to secondary (as opposed to elementary) school students.

ARGUMENT

I. CONTROLLING CIRCUIT PRECEDENT LIMITED THE SCOPE OF THE LITIGATION

Governing law in the Second Circuit when Good News applied to use Milford's facilities, and when this case was submitted to the District Court, allowed subject matter restrictions on limited public forums. It treated a ban on religious speech as a permissible subject matter restriction. Speech about secular subjects from a religious perspective is illicitly viewpoint based. *Lamb's Chapel v. Center Moriches UFSD*, 508 U.S. 384 (1993); *Bronx Household of Faith v. CSD #10*, 127 F.3d 207 (2nd Cir. 1997); *Travis v. Osego Apalachin District*, 927 F.2d 688 (2nd Cir. 1995); *Deeper Life Christian Fellowship v. Bd. of Educ.*, 852 F.2d 676 (2nd Cir. 1988);*Calash v. City of Bridgeport*, 788 F.2d 80 (2nd Cir. 1986) (rock concert).

The School Board in its decisionmaking and its counsel in preparing for trial understandably focused on the rule of *Bronx Household*, which both parties earlier agreed would likely be determinative of this case. (See letter of Norman Gross to Thomas Marcelle, Lodging, T-1 and T-2, and Marcelle's response, *id.* at V-1 and V-2). While other facts now loom large here, Respondent's attorney marshaled only those facts necessary to prevail under *Bronx Household*.

Counsel did not explore the temporal boundaries of the forum. The parties likewise left unexamined the question of whether the forum designated all after school time as the forum, or only some segments of after school time. Did other clubs, and particularly the clubs which Good News insists are most

like it, meet immediately after school? Would Good News dominate the forum at the time it proposed to meet?

Counsel for neither side adduced proof whether other categories of speech, such as political speech or commercial speech, speech urging alcohol or drug use or promoting sexual activity by minors, would also have been excluded from the Milford schools. The parties also had no occasion to explore what public school activities were occurring when Good News sought to meet.

Counsel had no reason to explore these questions. Controlling case law made them superfluous. A busy district judge, bound by a controlling and recent circuit decision, had even less reason to ask these questions.

This Court reviews less than two percent of all the cases presented to it. Why should a school board cast a decision other than in terms of controlling circuit precedent? How could counsel justify to his client or its insurance company the expense of litigating this case beyond what was demanded by binding Circuit precedent? If this Court changes the legal rules governing this dispute, it should not foreclose the possibility that the way the case appears is not an accurate reflection of reality, and that the School District indeed acted legally.

If any party here should bear the burden of failure to anticipate review in this Court, it is Petitioners. They could not prevail under Second Circuit law. For them, review in this Court was the only hope for relief. It is they who bear the burden of upsetting Respondent's lawful decision.

This Court so held in previous litigation over the scope of a school board's authority to exclude speech pursuant to

N.Y. Education Law § 414, *Ellison v. Dixon*, 349 U.S. 458 (1955). This Court there dismissed certiorari as improvidently granted where those seeking access had not compiled an adequate record to permit this Court to determine the existence of viewpoint discrimination. Although *Amicus* believes the judgment should be affirmed, should this Court reverse, it should at least allow exploration of those so far unexplained questions.

II. A Nominally Private Speaker Is Not Automatically Immune from Constitutional Scrutiny When Its Speech Has A Connection to Government

A. Introduction

Petitioners argue for reversal based on a set of simple and for the most part uncontested propositions. They insist that Good News is formally private. We agree. Petitioners contend that private religious speech is unrestricted by the Establishment Clause. We agree. They contend that religious speech is at the epicenter of constitutionally protected speech. We again agree.

Petitioners contend that the court below erred in distinguishing between religious worship and religious instruction. We agree, although we believe that both are again distinguishable from religious speech about secular subjects.

Good News insists that because it is formally private, the School District's refusal to grant access to its forum is impermissible and unjustifiable viewpoint discrimination against religious speech. We disagree, because (1) the fact that Good News is private is not alone determinative; (2) the

distinction drawn was subject, not viewpoint, based and; (3) the District had sufficient and adequate reasons not to permit Petitioners to meet immediately after school.

B. Speech May Be Neither Distinctly Public Nor Private

The universe of speech constructed by Petitioners is bipolar, with private and public speech at opposite poles. In between, they create a vacuum. On this model, it is easy to decide whether speech threatens to establishes religion. A speaker must be either governmental or private. If the former, the Establishment Clause is implicated, *Widmar v. Vincent*, 454 U.S. 263 (1981). If the latter, there can be no Establishment Clause violation. *Santa Fe ISD v. Doe*, 120 S.Ct. 2230 (2000). Because the Good News club is private, Petitioners insist that exclusion of its speech cannot be justified under the Establishment Clause. It follows, they say, that the exclusion is unjustifiable discrimination against religious speech.

This simplistic model will not do. The Establishment Clause is not the only justification for content-based discrimination against religious speech, *infra*, at page 18. Second, mechanical and formalistic approaches cannot delineate the boundary between state and private action in this or other contexts.

The complexity and ambiguity of the modern state calls for a more flexible doctrine, one recognizing that there is no unyielding and invariable 'bright line' between public and private. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999). The welfare and regulatory state engages in complex and varied relationships with the private sector. It owns,

controls and regulates large numbers of public spaces. Under these circumstances it is often difficult to distinguish between the actions of the state and the actions of those who, although intertwined with the state in relationships of various degrees of intensity, retain their private character. Although "conduct that is formally 'private' may become so entwined with governmental characters that it can be regarded as governmental action," *Evans v. Newton*, 382 U.S. 296, 299 (1966), not every contact with government converts private into state action, *Blum v. Yaretsky*, 457 U.S. 991 (1982).

Just as formally privateness is not alone determinative of state action in other constitutional contexts, *Evans*, *supra*, formal privateness is not determinative of whether speech is private or governmental. The polarities of private and public speech exist, and in most, but not all, cases control. While Petitioners' private/public model has the advantage of simplicity and clarity, like all simplistic dichotomies, theirs does irreparable harm to sound decision making.

C. This Court Has Rejected A Rigid Public Private Dichotomy Religious Speech Cases

The either-or ascription of speech to government or private speakers is not novel. It was urged by a plurality in *Capitol Area Review and Advisory Committee v. Pinette,* 515 U.S. 753 (1995), speaking through Justice Scalia.

Rejecting Justice Scalia's stark dualism, a majority insisted there were cases in which a speaker was formally private, but in which circumstances were such that the reasonable observer would conclude (even if wrongly) that the speech was the government's and therefore subject to

Establishment Clause constraints, *id.*, 515 U.S. at 776-78 (O'Connor, J., concurring); *id.* at 785-86 (Souter, J., concurring); *id.* at 799 (Stevens, J., dissenting); *id.* at 817-18 (Ginsburg, J., dissenting). These Justices did not deny that formal privateness would usually control; they contended only that it would not always control.

In *Pinette*, Klan sought to erect a large Latin cross on the grounds of the Ohio statehouse. Both the cross and its disreputable sponsor were formally private. Ohio insisted that the erection of the Klan's large and prominent cross would dominate the horizon and create a reasonable, if mistaken, impression in the public's mind that the cross was the state's and that the state had thereby endorsed Christianity.

Although seven Justices in the end concluded that tolerating the Klan's cross would violate the Establishment Clause, a different majority concluded that it did not do so simply because the cross and the Klan were private. As Justice O'Connor put it in her concurrence:

> Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result ... the Establishment Clause is violated. This is so not because of "'transferred endorsement,'" ... or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement.

515 U.S. at 717 (citations omitted; emphasis in original). Compare *id.* at 802-08 (Souter, J., concurring).

Pinette is not the only case involving speech of ambiguous provenance to be treated by this Court as subject to constitutional constraints. In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), this Court considered a creche erected by the Knights of Columbus on the Allegheny County courthouse staircase. Again, the fact that the speech was formally private proved no a barrier to application of Establishment Clause restraints. Under the circumstances there presented, the nominally private religious speech was reasonably understood by the public as government's speech. See *Pinette*, *supra*, 515 U.S. at 787 (Souter. J., concurring); *id.* at 777 (O'Connor, J., concurring).

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), also did not adopt Petitioners' rigid private-public dichotomy. The Equal Access Act ("EAA") created a federally designated limited public forum for private student clubs. On Petitioners' theory, this Court should have dismissed out of hand the School District's claim that the EAA established religion.

Mergens did not follow that tack. Instead, the Court carefully examined all the facts and circumstances, concluding that the clubs were not only private, but would be perceived as private by the relevant 'public' of other students. *Westside Board of Education v. Mergens*, *supra*, 496 U.S. at 250-53.

Although the distinction between public and private speech has arisen most often in the Establishment Clause arena, it has arisen elsewhere as well. *Hazelwood School District v.*

Kuhlmeier, 484 U.S. 260 (1988), recognized that schools have a legitimate interest in avoiding close association with controversial private speech. There, the Court was not concerned with official school speech, but private student speech whose publication in a student newspaper might be reasonably attributed by other students or the taxpaying public to the school district.[1] Here, too, school officials had ample reason to fear a confusion of private speech with official sanction.

III. THE DISTINCTION BETWEEN CONTENT AND VIEW POINT DISCRIMINATION IN A DESIGNATED PUBLIC FORUM IS STILL VALID

A. An Exclusion Of Religious Speech Is A Subject Matter Distinction

The parties agree that a public school is not a traditional public forum. The court below evaluated this case under the standards applicable to a limited designated public forum, a well settled sub-category of designated public forum recognized by the Second Circuit.

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1. The Courts of Appeal have likewise wrestled with the difficulty of categorizing speech in which private and public intersect in the context of speech suggesting approval of racism. Thus, the Eighth Circuit has wrestled with the question of whether signs announcing participation in the Adopt-A-Highway program is public or private speech, or whether sponsorship announcements on public radio are those of the state or the sponsor. *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), petition for cert. pending; *Knights of the KKK v. Curators*, 203 F.3d 1085 (8th Cir. 1999).

The Second Circuit has interpreted cases such as *Perry Educ. Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37 (1983) and *Cornelius v. NAACP LDEF*, 473 U.S. 788 (1985), as holding that a public body need not open a designated public forum for speech on the entire universe of subjects of human interest. When designating a forum, it may impose reasonable subject matter limitations on access. It may not, however, impose such restrictions on an *ad hoc* basis after the designated forum is created. *Deeper Life Christian Fellowship*, *supra*, 852 F.2d at 680. The Second Circuit reasons that since the governmental unit is under no obligation to designate the forum, it can open it for less than all topics. Petitioners do not quarrel with this rule.

The Second Circuit treats restrictions on all religious speech as a subject matter, not viewpoint, classification. *Bronx Household of Faith*, *supra*; *Deeper Life*, *supra*. Petitioners insist that the exclusion of the subject of religion is necessarily viewpoint discrimination. The distinction between viewpoint and content based discrimination is concededly often elusive, although "viewpoint discrimination is ... an egregious form of content discrimination," *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). But if Petitioners are right, the distinction between the two collapses.

The Second Circuit's treatment of restrictions on religious speech as subject matter ones is not unique. The Ninth and Fifth Circuits agree. *DiLoretto v. Downey USD*, 196 F.3d 958 (9th Cir. 2000); *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482 (5th Cir. 2000). *Lamb's Chapel* carves out an exception to that: a school district cannot ban speech from

religious viewpoints concerning otherwise permissible secular subjects. *Lamb's Chapel* pointedly did not hold that any ban on pure religious speech would be viewpoint discrimination.

Petitioners argue that if *Lamb's Chapel* left unanswered the question of whether religious exclusions were permissible, *Rosenberger v. Rector*, *supra*, "slammed the door shut" (Brief at 16-20) to any claim that in creating a limited public forum one can exclude religion from the list of permissible subjects. Although *Rosenberger* contains some language which might be so construed, 515 U.S. at 831, the opinion as a whole does not sustain this reading. *Rosenberger* was at pains to note that the magazine addressed a wide variety of topics addressed by funded 'secular media,' and those topics were broader than just religious teachings, 515 U.S. at 831, a holding precisely tracking the holding in *Lamb's Chapel*.

Rosenberger also noted that the publisher of the magazine was not a church or other religious institution. That caveat, repeated twice in the opinion, 515 U.S. at 840 and 844, and echoed by Justice O'Connor in her concurrence, *id.* at 850, is inconsistent with equating content and viewpoint based discrimination. If religious speech can never be treated differently than secular speech, those caveats were not just gratuitous. They were wrong. The Fifth and Ninth Circuits in post-*Rosenberger* decisions (*DiLoretto* and *Campbell*, *supra*) agree that the door was not slammed shut in *Rosenberger*, and that restrictions on religious speech are subject matter ones.

Although religion may well color one's entire world view, such that for some believers there is nothing but religion, the same is and was true of politics, communism, feminism or

Aristotelian philosophy. It does not follow that the subjective perspective of those who see the world from a unitary perspective should control the categories of constitutional law. The state must not punish people for, nor dissuade them from, viewing the world unitarily. However, neither the government to be compelled to view the world in the same way. *Cf.*, *Bowen v. Roy*, 476 U.S. 693 (1985) (believer had no right to force religious views on internal operations of government). If subject restrictions of religion are viewpoint based, then these other ones are as well.

Professor Laycock urges (Brief at 14-17) that applied to religious speech any distinction between subject and viewpoint is incoherent and should be abandoned. "Nearly all believers," he says, "think that their faith has implications for their morals and for other issues in their life." But what Professor Laycock says of religion is equally true of politics (*i.e.*, Communism), aesthetics, or any other comprehensive ideological view of the world.

One's views on tax cuts, sexual equality, or abortion are not easily divorced from one's views about humanistic or theistic ethics, private capital, or party affiliation. If there is no coherence to the content-subject matter distinction in religion, it is hard to see it as coherent in any other category of speech. Government may no more silence political than religious speech. So long as the Court distinguishes between content and viewpoint, there is no justification for singling out religion as an exception.

B. The Distinction Between Subject And Viewpoint Discrimination Is Both Sensible And Workable

The distinction between subject matter and viewpoint discrimination is commonsensical. A subject matter exclusion encompasses an entire area of knowledge or thought; viewpoint restrictions single out a single perspective, and ban it from the forum, distorting the discussion of an otherwise permissible subject. Subject matter restrictions are far less likely to create this danger.

Humans routinely classify knowledge by grouping a range of related ideas under subject matter headings. In settings as familiar as college faculties and academic departments, bookstores, public libraries and the programs of municipal theater companies, such classifications are routine, uncontroversial and proven not to be obstacles to full and vigorous exchange of ideas. On the contrary, without the ability to broadly classify ideas into comprehensible subjects, intelligent and intelligible conversation would be drowned in a wave of unrelated ideas.

The Constitution, with its special provisions regarding religion, proceeds on the assumption that it is possible, desirable and sometimes imperative, to characterize some human activities, ideas and concepts as uniquely religious. That classification does not inherently convey a message that religion is more or less important than any another subject. Rather, it embodies the judgment that religion is different and that it is useful to group common ideas as religious in an effort to address what is unique about those ideas.

Where properly justified, subject matter restrictions do not distort the marketplace of ideas. The government may not exclude religious ideas (or any other subject) because it wishes to suppress them. It may, as the Respondent did here, reasonably exclude them to preserve a property for its intended uses or for other legitimate reasons.

Viewpoint discrimination represents a presumptively invalid departure from the requirement of equal treatment of ideas. The justification for tolerance for reasonable content based distinctions and the intolerance for viewpoint based ones was aptly stated by Justice Jackson in *REA v. N.Y.*, 336 U.S. 102, 112 (1949). "There is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." In a content based restriction, all who wish to speak on a subject are excluded. The majority must accept the same denial of access as the minority. If the majority is unwilling to be excluded, the minority is assured access to the forum.

A different case would be presented if a subject matter restriction was intended to suppress a particular viewpoint. Professor Laycock in his brief *amicus curiae* posits the case of a Southern town creating a designated limited public forum, but excluding race as a permissible subject matter. That, he says, would really be a not-so-subtle viewpoint discrimination.

Even if such a rule would not be invalidated by an improper motive to suppress speech critical of the racial status quo, see, *Crawford-El v. Britton*, 523 U.S. 574 (1998), it would not necessarily be valid. By analogy to *Lamb's Chapel*, such a

rule could probably not exclude a discussion of improving education by integrating schools. Most important, subject matter limitations are not automatically acceptable. Such distinctions must still be reasonable,[2] necessary to preserve the property for its intended uses, and crafted so as not to exclude substantially more speech than necessary to preserve property for its intended uses. Those are substantial protections, alone and together.

IV. No Evidence Supports Petitioners' Claim Of Exclusion Based On Disagreement With Their Religious Purpose

A. Non Constitutional Claims May Support Subject Matter Restrictions

Petitioners proceed as if the only defense to a claim of content discrimination is a complete violation of the Establishment Clause. They cite no authority for this proposition. We think it is flat out wrong. The need to preserve the facilities for their intended use formulation, see, e.g., *Perry*, allows the School District charged by state law with the task of setting these purposes leeway beyond what the Constitution itself requires. Those reasons may be sufficient without amounting to a full blown constitutional violation.

Nothing in the standard for sustaining subject matter (or, for that matter, viewpoint) restrictions limits the universe of

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2. Application of the more stringent compelling interest standard would have the effect of collapsing content and viewpoint discrimination into one standard, since both would be judged by the identical legal test.

acceptable justifications to the need to avoid constitutional violations. Compelling interest analysis is not an exercise in resolving conflicting constitutional provisions. Rather, it is a method of resolving the tension between constitutional values and the practical necessities of governance. Only overarching values ought to trump constitutional rights, but those values need not be of constitutional magnitude. One searches this Court's compelling interest (or intermediate scrutiny) cases in vain for a hint of the idea that only constitutional claims count.

B. Petitioners Have Not Proved Discrimination Because Of Disapproval of Its Proselytizing

Beyond their general equation of a religious exclusion with viewpoint discrimination, Petitioners contend that their exclusion was viewpoint based because the Respondent objected to their particular "religious purpose" (Brief at 20). Nothing in the record supports the claim that Petitioners' evangelizing purpose was the cause of their exclusion. No evidence demonstrates that Respondent disapproved of Good News' belief that a "challenge to Christians and an invitation to believe to non-Christians are integral elements of a Christian viewpoint." (*Id.* at 21-22).

There is no record evidence to sustain a finding that a less "aggressive" religious club would have been permitted to meet. Respondent was happy to bus children to the club's meetings so long as there was room on the buses. The practice ended only when bus routes became unavailable for reasons unrelated to Good News' beliefs. (App. P; Deposition of Stephen Fournier, at pp. 11-12; 31).

C. An Application For Access Must Be Judged When And As Made

Perhaps sensing that this argument cannot be sustained, Petitioners resort to a different tack. They insist, though, that Respondent should not be permitted to judge them by their stated purpose. (Good News' application stated that it sought space for religious purposes.) Instead, they claim, Respondent should be required to ignore this self-categorization, and engage in a retrospective, comparative, re-characterization of its activities to determine if Petitioners were competing with other groups functioning in the forum. Petitioners argue that their speech could be multiply labeled (Brief at 23-24); theirs was not only religious speech, but speech about morals as well. Since in its view other groups allowed access taught morality, it follows its exclusion was illicit viewpoint discrimination.

Petitioners' application announced that it sought to engage in religious instruction. (Lodging, W-1). When asked to detail its program, Good News described just such a program. As far as school officials knew, they were making a subject matter, not viewpoint, decision. Public must decide applications for access to a forum based on what they are told. They have neither the ability nor the time to monitor every use of a forum to determine whether the group's post admission activities parallel (by any of multiple characterizations) a denied group's program. Petitioners' argument would require officials superintending a forum to engage in ongoing surveillance of speakers, a requirement not conducive to freedom of speech.

Petitioners refer to the forum as one "by practice" to "youth organizations for the purpose of developing children's

moral and spiritual character" (Brief at 23-36), citing to various documents in the Lodging, many of which are cursory and general assertions in affidavits and others of which are promotional materials published by the national or regional headquarters of groups given access to the Milford Schools.

Neither New York law, Milford regulations, nor Milford's letter to Petitioners denying their application (Lodging, V1-1), use the phrase for "moral or spiritual training." That is a category wholly of Petitioners' creation.

A limited designated public forum exists only by virtue of the conscious decision of the owner of the property (not outsiders seeking to use the property) to devote it to certain speech purposes. If the owner may open a designated forum only for limited purposes, it must judge applications by what purposes are proposed. *Perry Educational Ass'n v. Perry Local Educator's Ass'n, supra*; *City of Madison v. Wis. Emp. Rel. Comm.*, 429 U.S. 167, 180 (1976) (Stewart, J., concurring). Respondent chose to create the limited designated forum authorized by this law. Because it is the District's intentions which count, Petitioners should not be empowered to recast the forum as they see fit.

But Petitioners say since other groups which engage in what they characterize as instruction in the moral and spiritual development of youth (including the Boy Scouts, Girl Scouts and Little League) do meet, it follows that Good News was excluded from the forum because it would bring a religious point of view to that enterprise. They strive mightily to bring themselves within *Lamb's Chapel* by asserting that they, like

the Scouts, wish to discuss social and moral issues, except that they wish to do so from their own religious point of view.

In its application, all the School District had before it when it first acted, Good News made no reference to "moral and spiritual" training, but described its purposes as "singing songs, hearing Bible lessons, and memorizing scripture (Lodging W-1). *Id.* at X-1 (describing Good News Clubs generally). The Club provided a similar, but more detailed, description when asked for additional description. (Lodging AA-1 - 4). Again no mention was made of "moral and spiritual" training.

Of course, one can discuss moral issues from a religious point of view. Assuming any distinction between religious and secular speech can survive, distinguishing between religious catechesis (the Good News Club) and interjecting religious views into a general debate about social issues (*Lamb's Chapel*) ought to be that distinction. The point is not, as the *amicus* theologians would have it, that the School District ignores or condemns believers' dependence on revelation for moral guidance. It is that the speaker's motivations do not control the boundaries of the forum.

A review of the materials used by Petitioners' volunteers shows nothing on any secular issue discussed from a religious point of view. Its invocation of *Lamb's Chapel*'s "religious viewpoint on secular subjects" rubric is a *post hoc* manipulation of the record, forcing religious catechesis into a Procrustean bed of public debate. Good News discusses religious issues from a religious perspective only. Its programs are nothing more than mid-week Sunday School lessons.

Petitioners' revisionist position is most strikingly illustrated by their description of the Little League as an organization dedicated to teaching values from a competing secular point of view. (App. C3, ¶ 18). Any organized activity has rules (*e.g.*, it is forbidden to intentionally 'bean' a batter), and, presumably therefore, some incidental effect of teaching "morals and spiritual values." Granted, hitting a home run or pitching a no-hitter is an uplifting experience, perhaps even a spiritual one, but Little League coaching is not fairly described as moral or spiritual instruction. To categorize the Little League as an institution whose purpose is to teach moral and spiritual values is to make forum analysis into a trivial word game. "Calling a thing by a name does not make it so." *City of Madison, supra*, 429 U.S. at 174.

The Girl or Boy Scouts might present a closer case had Petitioners offered proof describing the time these groups met and their actual activities. All that is in the record are national policy statements, which may or may not reflect actual practice in Milford (Y-1 - Y-3; Z-2, AA1-5).

Petitioners' viewpoint discrimination argument is at bottom based again on a constitutionally false dichotomy. There is, in Petitioners' Manichean view of the world, the anti-religious and the religious. On this theory, the exclusion of religion is always impermissible, necessarily conveying a viewpoint of hostility and denigration of religious points of view. They cannot conceive of any middle ground position, one which neither denigrates nor endorses religion. That, however, is not the scheme the Constitution contemplates. *Cf., Grove v.*

Mead School District, 753 F.2d 1528 (9th Cir. 1985) (Canby J., concurring).

Students do not perceive a message of Marxist hostility toward capitalism from § 414's ban on commercial activity. N.Y. Educ. Law § 414; *Matter Bd. of Educ. of the City School District of the City of Buffalo*, 21 Educ. Dept. Report 585 (1982) (excluding commercial uses from scope of § 414). It is equally possible that students see the no religious speech rule as nothing more than a rule of etiquette for public education. Religion is valued, but its public expression is not appropriate at every time and place.

V. MILFORD WAS ADVANCING A SUBSTANTIAL INTEREST IN TURNING DOWN PETITIONERS' APPLICATION

A. Exclusions Of Religious Speech Will Not Always Pass Muster

The requirement that content based limitations on the scope of a designated forum be acceptable is not absolute. The restriction must be reasonable, necessary to preserve the forum for its intended use, and not prohibit substantially more speech than is appropriate to achieve those ends. Like limitations on the time, place or manner of speech, these qualifications are not mere rhetorical covers to prettify suppression.

Treitly v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), construes Education Law § 414 to ban all religious uses of school facilities. It does not distinguish between programs immediately after school and those at other times. Applied broadly, *Treitly* fails even the most relaxed test for content based discrimination. It is sufficient to note that a

decision to exclude all religious speech at all times from public school buildings would be far broader than necessary to preserve the forum for its intended purpose.

Religious programming scheduled other than immediately after school, and targeted at the community at large will generally not interfere with the educational purposes of the forum. There is no realistic possibility of confusing after hours use by one of many non-school uses with the school, especially when no school activities are occurring simultaneously, cf. *Lamb's Chapel*, *supra*; *Widmar v. Vincent*, *supra*. If held other than (as here) immediately after school, any impact of the compulsory education laws is also dissipated by the need for a separate decision to return to the school. *Cf. Lynch v. Donnelly*, 465 U.S. 668 (1984); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)

Long before the public forum doctrine matured, state courts routinely rejected claims that weekend and evening rentals of school buildings for religious purposes violated the Establishment Clause. See, e.g., *Resnick v. East Brunswick Bd. of Ed.*, 77 N.J.2d 88, 389 A.2d 944 (1978); *Lamb's Chapel v. Center Moriches School District*, *supra*, unanimously dismissed the claim that if the school were to allow religious viewpoints to be heard on its premises on weekends, there would be a violation of the Establishment Clause. That reasoning would control in most cases other than those immediately after school. It does not follow from this that the Respondent had no reasonable concerns in this case.

B. Respondent Had Substantial Establishment Clause Concerns

Petitioners dismiss any Establishment Clause defense citing *Rosenberger* and *Lamb's Chapel*. Those cases are, as we will show below, wholly different from this case. While it may be that, as some of our fellow *amici* contend, the District in fact would have established religion had it granted Good News' request, this Court need not decide that question. Since, as we have established, *supra*, at p. 18, good cause for a subject matter exclusion need not be justified by the need to avoid a formal constitutional violation, it should suffice that Respondent had substantial concerns in this regard.

Free speech protections are not irrelevant to religious speech. Religious speech is not second class speech. *Pinette*, *supra*. But it is not irrelevant the Club's religious speech was to take place on government property. If non-establishment is not a license to censor religious speech on an *ad hoc* basis, neither is freedom of speech grounds for requiring Respondent to balance itself exactly at the precipice of the church-state abyss.

Had Respondent concluded that reasonable elementary school students would understand that the Good News Club was private, and that the school was indifferent as to their participation, its decision to permit the Club to meet (with appropriate safeguards, including parental consent and disclaimers of public sponsorship, and a ban on teacher participation) might withstand Establishment Clause attack.

Conversely, though, if school officials conclude, as Milford's did, that first through sixth graders would mistake as

publicly sponsored a class in religion held in a public school classroom immediately after school, using instructional methods not markedly different from the school's regular instruction, at a time when school activities are still taking place, students are gathered in that place through force of the compulsory education laws, and when the Club would dominate the forum, that judgment is also entitled to deference.

Principles governing the separation of church and state, embodied most prominently in the Establishment Clause, are not merely technical legal doctrines, with meanings as precise and channeled as the provisions of the Uniform Commercial Code. Rather, they give enforceable legal form to public policies broader than the law alone. While local officials cannot sink below the floor set by the Clause, there is "room for play in the joints," *Walz v. Tax Comm'rs*, 397 U.S. 664 (1970), sufficient to allow school officials to decide that a buffer period between the end of school and the use of its facilities by religious clubs ought to stand.

Some leeway with regard to the possible meaning of the Establishment Clause is not the same as any colorable or not so colorable Establishment Clause claim. Not every hypothetical or far-fetched argument about the Clause will sustain the exclusion of speech. This was true of the University of Missouri's claim in *Widmar v. Vincent*, 454 U.S. 263 (1981), that allowing student religious clubs to meet in unused college classrooms would violate the state constitution. The proposed use took place at night, long after classes were over and the students were of college age, whom this Court has long held are far less susceptible to confusing religious indoctrination with

instruction. *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976).

Similarly, in *Lamb's Chapel*, the religious uses occurred on weekends when school was not in session, the program was not directed at school children and did not emulate regular school instruction. In each of these cases, nothing resembling an Establishment Clause problem, or for that matter confusion between the public and the private, was shown.

That this rule allows school officials to exercise discretion is not grounds to reject it. The articles suppressed in *Hazelwood* could have been tolerated by school officials. No law required suppression. *Hazelwood*'s upholding their exclusion necessarily recognizes discretionary authority for school officials to determine access to its fora to avoid confusing private and public speech.

VI. THE RELEVANT AUDIENCE FOR ASSESSING REASONABLENESS ARE FIRST THROUGH SIX GRADERS

Pinette teaches (though without a conclusive answer) that in considering the possibility of confusing state and private speech, the courts must identify the reasonable viewer, and assess the question from her point of view.

The relevant reasonable observers who might mistake school toleration of religion in this case for school sponsorship are not school officials, citizens at large, nor parents. The relevant audience here is the school population, as it was in *Mergens*, *supra*. In Milford's one-building school, this audience ranges from high school seniors to kindergartners.

The Club itself targets an audience of elementary school students, aged roughly 6-12. That is, as this Court has recognized over and over again, an impressionable age audience. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (collecting cases).

A reasonable adult or adolescent can tell the difference between school-sponsored and school-tolerated activities. *Mergens*, *supra*. But first graders? It is not credible to argue, as Petitioners must, that first graders have the same reasoning ability to discern the difference between school-sponsored and school-tolerated events as adolescents or college students. (We are likewise skeptical of Petitioners' unsupported claim that first graders would on their own conclude that the absence of a religious club immediately after school manifested hostility toward religion.) School officials could reasonably conclude that they could not, and that any effort to explain the difference would be futile, contrary to Petitioners' confident, if uninformed, judgment that such explanations would be effective (Brief at 35).

This reasoning cannot be repelled by arguing down from *Widmar* and *Mergens* (Brief at 31-35). *Widmar* held that college students can discern the difference between school-sponsored and school tolerated; *Mergens*, relying on a congressional fact finding that adolescents in high school could make the same distinction as their slightly older peers, upheld the Equal Access Act. Apparently, if B is almost A, and C is almost B, C equals A. Not so, neither in math nor in law.

No congressional fact finding supports the extension of that level of discernment to elementary school students as the

Equal Access Act supports the extension of *Widmar* to high school students. The original bill which became the Act initially applied to both elementary and secondary schools. Coverage of elementary school was dropped because Congress could not conclude that elementary school students could make the relevant distinction. Petitioners' arguments overrule this congressional limitation, and would necessarily extend the Act's coverage to elementary schools. Petitioners' argument fails not because of a fear of starting down the slippery slope. It is the bottom of the slope.

Petitioners' argument simply equating religious speech with secular speech invalidates much of the Equal Access Act. The Act guarantees equal access to all secondary student clubs regardless of their subject matter. However, the Act imposes at least one special restriction on religious clubs. School personnel may not participate in religious club meetings. They are free to participate in other meetings (20 U.S.C. 4071(c)(3)).

In upholding the constitutionality of the Act, this Court cited this provision as evidence that no student could possibly mistake the club's activities for those of the school. 496 U.S. at 251. Yet on Petitioners' theory, the participation of a school official in an after school club, initiated by students and voluntarily attended, should not create any Establishment Clause problems, and this section would be unconstitutional. Far from invalidating this restriction, the Court read it (in the face of arguably permissive language, see *Mergens*, *supra* 496 U.S. at 259-60 (Kennedy J, concurring)) as mandatory.

Petitioners' error is the same here as elsewhere. They simply ignore the possibility that the Establishment Clause

imposes special requirements on government to avoid partnerships with religion. That is not hostility to religion, but a constitutionally sanctioned time, place or manner restriction. That requirement authorizes limitations on government involvement with religious speech in ways that its involvement with other kinds of speech is not limited.

The obligation is not by any means unlimited. But excluding religious clubs from the shoulder period immediately after school is a permissible means of government avoiding confusion of constitutional dimension.

CONCLUSION

For the reasons stated, the judgment should be affirmed. In the alternative, the case should be remanded for further fact finding.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 2000

THE GOOD NEWS CLUB, ANDREA FOURNIER and DARLENE FOURNIER, Petitioners,

v.

MILFORD CENTRAL SCHOOL, Respondents

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

The interest of the *amici curiae* [1] is as follows.

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of this nation's state school boards associations. These boards govern more than 15,000 local school districts that serve more than 46.5 million public school students – over 90 percent of all elementary and secondary public school students in the nation. NSBA has had a longstanding interest in education issues, including those touching on the Establishment Clause.

The American Association of School Administrators, founded in 1865, has a membership of more than 14,000 educational leaders across North America and other countries. AASA seeks to achieve the highest quality of public education through effective school leadership.

The Horace Mann League was founded by a group of leading educators in 1922. According to the League's beliefs, our public schools should be free, classless, nonsectarian, and open to all children of all of the people. The schools should be dominated by such purposes as will ensure the preparation of children and youth for effective citizenship in our democracy.

STATEMENT OF THE CASE

The heart of this case is the authority of public school districts to prohibit outside groups from engaging in proselytizing activities and religious worship with

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Sup. Ct. Rule 37.3 The undersigned counsel has authored this brief, and no person or entity other than *Amici* has made a monetary contribution to its preparation or submission. Sup. Ct. Rule 37.6.

elementary school students immediately after the last bell while on elementary school grounds.

The Good News Club, whose activities routinely involve religious hymns and games and an opportunity to accept Jesus as a personal Savior, applied to use elementary school space for club meetings immediately following the end of the school day. After twice examining the request, the district concluded that the group's activities constituted religious worship and thus were outside the scope of the forum open for use of facilities for outside groups. The objection of officials centered on the impact to children when an adult-initiated, adult-led worship service and efforts to proselytize[2] occur with the school district's consent and apparent endorsement immediately after school.

The Good News Club's free speech claim fails because the school district did not open a limited forum or otherwise make its facilities available for outside groups, such as Good News Club, to meet during the post-school period. All other groups met during a later time frame, at least two hours after the last class ended – eliminating the very conflict that exists here. Many other groups were allowed to use school facilities. However those groups differ in that they were allowed to meet in the evening, not immediately after school and they presented no concern if the imprimatur of the school were mistakenly placed upon them.

The genuine concern of the school board that adopts such a protective stance is proper. The U.S. Supreme Court has said repeatedly that the Constitution's First Amendment Establishment Clause is violated when religious activities appear to carry the endorsement, imprimatur, or sponsorship of the public schools. That impression is unmistakable when students walk out of subject-based

[2] Contrary to Petitioners' and *Amici* arguments, religious proselytizing and instruction is no different than religious worship and religious practices. E.g. *Texas Monthly v. Bullock*, 489 U.S. 1, 23 (1989); *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

public school instruction and within minutes are studying faith-based materials from religious instructors. When the two events happen in such close proximity, the typical elementary school student would have a difficult time distinguishing between the school-offered programming and the religious programming offered by the religious leaders. The Court should take the opportunity to make clear that conducting worship services for elementary children on school grounds is inappropriate and a violation of the U.S. Constitution's Establishment Clause.

ARGUMENT

The heart of this case is the authority of public school districts to prohibit outside groups from engaging in proselytizing activities and religious worship with elementary students immediately after the last bell while on elementary school grounds.

As early as 1943 this Court declared that the First Amendment freedoms must receive "scrupulous protection" in schools "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[3] The U.S. Supreme Court has recognized First Amendment protections[4] should be afforded to individuals within public schools[5], tempered by the schools' primary mission to educate and instill civic values.[6] Schools thus daily walk the narrow line of respecting First Amendment rights and

[3] *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..." U.S.Const. Amend. 1.

[5] "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students". *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969).

[6] *Fraser v. Bethel School District No. 403*, 478 U.S. 675 (1986); *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988).

teaching students the responsibilities concomitant with them. That narrow line is presented in this case -- schools must heed students' First Amendment rights to free speech and free exercise of religion while adhering to the boundaries imposed upon the public schools by the Establishment Clause.

I. The district cannot be compelled to open the forum for the purpose of accommodating religious instruction.

A. Milford did not, nor does the law require it to, open a forum broad enough to encompass the Good News Club's request. Petitioners may not compel the school to open its forum merely by making allegations of religious discrimination or because they are engaged in religious activities.

Under this Court's analyses, the first step in a freedom of expression case is to determine the type of forum involved. The Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. A traditional public forum is one, like a public sidewalk, which "by long tradition or by government fiat, ... has been "devoted to assembly and debate." *Arkansas Educ. Tele. Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A designated forum is one that is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 802 (1985).

The public forum receives a high degree of protection; excluding speech only when the exclusion is necessary to serve a compelling state interest, See *Cornelius*, 473 U.S. at 800. The government's ability to restrict speech in a designated public forum is similarly limited. *See International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992). The rules governing regulation of speech in a non-public forum are the least restrictive of the three. Indeed "limitations on expressive activity conducted on this last category of property must survive only a much more limited review." *Krishna Consciousness* at 678 – 79. As stated in *Lamb's Chapel*: "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that' control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel* at 392- 393.

Given the dramatically different level of review that is applied, the determination of forum at the outset of the analysis is of critical importance to the outcome of each case. Here, the district never created a designated public forum open for indiscriminate public use. At best a limited forum was created for community groups to meet during the evening hours.

This Court has long recognized that public school buildings are different from other forms of public property for purposes of free speech analysis. Public school property is, first and foremost, dedicated to the mission of educating children. The school must have the power to ensure conditions that are consistent with that mission. For First Amendment purposes school districts are presumptively closed fora unless they take specific actions to open a forum to outsiders. Schools may, but do not have to, open their facilities to outside groups. As stated by this Court: "It is common ground that the District need not have permitted

after-hours use of its property". *Lamb's Chapel* at 390. Schools must by positive action open their forum for expressive activity to change this forum status. This presumption that public school grounds are closed serves to ensure that school officials can regulate the environment to focus on that mission with reasonable regulations, as opposed to compelling reasons.

In the case at bar, it is not clear that the district had opened any forum during the period immediately after the school day.[7] Here, the school permitted groups to meet, but only substantially after the school day ended. All outside organizations meeting on school grounds did so at least two hours after classes finished. Good News sought access immediately after school or during the last few hours of classroom instruction for the purpose of setting up for their religious instruction and services. The district had not opened this forum for outside use, nor must it. Like private property owners, the government has a right to exclude all others and preserve the property under its control as long as it does so on a nondiscriminatory basis. The time slot immediately after school was not open by tradition or designation; neither Good News Club nor any other outside group had a right to access to the building at this time. The school district retained control over the forum, during that sensitive time immediately after school, allowing groups to meet after 6:00 p.m. Access to the facilities only began later in the day, when school officials allowed some outside groups to meet. Good News has no right to demand the district open its forum wider than it has for other groups.

[7] This case is unlike *Good News/Good Sports Club v. School District*, 28 F.3d 1501 (8th Cir. 1994) in which the district had opened a forum immediately after school. There the district opened the facilities to all community groups except those involving religious speech. The Eighth Circuit found this resulted in viewpoint discrimination. Here Milford had not opened a similar forum.

B. The school district has the authority to limit its forum to include only those activities consistent with its mission and the stated purposes of the forum.

Further, the school has the authority to open a forum for limited uses, provided access is both reasonable in light of the purpose of the forum and viewpoint neutral[8]. Here the district during the immediate after-school hours had not opened its forum for indiscriminate use. We cannot conclude on this record that the school district clearly intended to open its doors to all activities for indiscriminate use. Contrary to the allegations made by Petitioners and their Amici, religious groups were not the only groups excluded from the limited forum opened for outside activities. The school forbade access to commercial activities, fraternal organizations, political speech, and civic meetings not open to the general public as well, citing the impressionability of students and the inappropriate subject matter on school grounds. The boundaries of the forum were both reasonable and viewpoint neutral. The school allowed late evening access to the facilities when the groups had a mission compatible with the school. Such authority is within the bounds of the First Amendment in the school

[8] This case is distinct from *Lamb's Chapel v. Center Moriches Union Free School District* on this issue. *Lamb's Chapel* stands for the proposition that traditionally protected speech – i.e. speech from a religious viewpoint—cannot be squelched. In *Lamb's Chapel* this Court ruled that the school district violated free speech rights of an evangelical church by refusing it permission to use school facilities to show a "family oriented movie --- from the Christian perspective". The school board policy allowed use of school building outside of school hours for certain designated purposes but specifically excluded religious purposes. The Court ruled that the school engaged in "viewpoint" discrimination by allowing other groups to present their views on family values but denying petitioners the right to present the subject from a religious perspective. The ruling in *Lamb's Chapel* was based on viewpoint discrimination. Here the district has not opened the forum either in time or in content.

context and indeed fulfills the school district's long-held duty.

Cases such as *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988) have instructed us that "unless the schools affirmatively intend to open a forum for indiscriminate use, restrictions reasonably related to the school's mission ... do not violate the first amendment." As stated by the Ninth Circuit, quoting *Hazelwood*, "educators have the right to control expressive activity that students, parents and other members of the public 'might reasonably perceive to bear the imprimatur of the school'" *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817, 825 (9th Cir. 1991).[9]

The Fifth Circuit pointedly drew this conclusion *in Campbell v. St. Tammany Parish School Board*, 206 F.3d 482, 488 (5th Cir. 2000) explaining,

> St Tammany is attempting to open its school facilities. A contrary holding [requiring access to religious groups] would frustrate that objective and diminish, rather than increase, opportunities for freedom of speech. Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by-the First Amendment, without inviting political and religious activities presented in a form that would disserve its efforts to maintain neutrality. We are persuaded that the Constitution does not deprive local school boards of that choice, and courts stand ready to hear complaints of pretext or bad faith. Were we to hold otherwise, a school board would be put to a choice of maintaining a public forum or no forum at all.

[9] Also *Diloreto v. Downey Unified School District*, 196 F.3d 958 (9th Cir. 1999) in which the court upheld the district's decision to refuse to post the Ten Commandments on the high school baseball field wall in spite of the presence of other posted messages and commercials. *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000) cert pending (Jan 2, 2001) in which the court upheld the district's restrictions of student graduation speeches.

The Milford school district was concerned with lending its imprimatur to the religious instruction and worship and proselytizing undertaken by the Good News Club. The district, considering the tender maturity of its audience, sought to ensure neutrality toward political, commercial and religious messages and inappropriate activities that could be misconstrued. Restricting access in this way is reasonable and viewpoint neutral, and thus passes muster under a free speech analysis.

Further, this kind of restriction is compelled, because to do otherwise would violate the Establishment Clause.

II. Religious instruction and services provided to elementary students immediately after school on school premises provide such an appearance of endorsement and school sponsorship to render it a violation of the Establishment Clause.

Even if Milford did open a public forum during the afternoon hours, restricting the Good News Club from the forum is consistent with Milford's constitutional responsibilities. If a forum were available, Milford would still be within constitutional bounds to exclude certain activities if to do otherwise would violate the Establishment Clause. As stated by this Court in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995): "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."

In *Lamb's Chapel* the Court left open the question as to whether a school may, or must, restrict religious services on school premises. In a footnote Justice White noted that because petitioners did not challenge the school's denial of

an earlier application for permission to hold religious services in the school at certain specified times, "the validity of the denial is not before us." *Lamb's Chapel*, 508 U.S. at 393 fn.6. Thus, the Court would not necessarily uphold a right of a church to use a school building for religious worship even though a broad spectrum of other groups were allowed to use the facility.

As this Court noted in *Lamb's Chapel* "[t]he District, as a respondent, would save its judgment below on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggested in *Widmar v. Vincent* [citation omitted], that the interest of the State in avoiding an Establishment Clause violation"may be [a] compelling" one justifying an abridgment of free speech otherwise protected by the First Amendment". *Lamb's Chapel* at 394.

Substantial litigation has been generated in an attempt to delineate the appropriate church-state relationship vis-à-vis education. Courts have been called upon to review various public school policies and practices to ensure that students are protected from religious inculcation by the state. Cases have dealt with First Amendment implications of such topics as state aid to parochial schools[10], religious activities and observances in public schools[11], and curricular accommodations for religious reasons in public education[12].

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[10] *See Committee for Public Education and Religious Liberty v. Regan*, 100 S.Ct. 840 (1980); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Education of Central School District v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947).

[11] *E.g., Florey v. Sioux Falls School District*, 619F.2d 1311 (8th Cir. 1980); *Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997).

[12] *E.g., Palmer v. Board of Education of City of Chicago*, 603 F.2d 1271 (7th Cir. 1979); *Stark v. Independent School District No. 640*, 123 F. 3d 1068 (8th Cir. 1997).

This Court has been vigilant in its rejection of public school religious observances, preventing the imprimatur of the school and state from being placed upon one religion or any religious activity. School sanctioned prayer and Bible reading in public schools have been declared unconstitutional[13]. Also, the observance of holy days[14] and the display of religious symbols[15] have been found to be unconstitutional within the context of the public schools. Schools cannot sanction prayer at graduation ceremonies[16], nor at the beginning of football games[17], or other school sanctioned events[18]. The Supreme Court has noted that whether or not religious observances in school are voluntary is irrelevant. When such activities are state-sanctioned, "the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [19] Here the question presented is whether religious instruction, proselytization, and worship services provided to elementary students immediately after school on school premises provides such an apparent endorsement of school sponsorship to render it unconstitutional.

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[13] See *School District of Abington Township v. Schempp, Murray v. Curlett*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962.

[14] *E.g., Altman v. Bedford Central School District*, 45 F.Supp. 2d 368 (S.D.N.Y. 1999).

[15] *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), cert. denied 115 S.Ct. 1822 (1995) in which the court found the presence of a portrait of Jesus in a public school was unconstitutional; *accord Joki v. Board of Education of Schuylerville Central School District*, 745 F.Supp. 823 (N.D.N.Y. 1990).

[16] *Lee v. Weisman*, 505 U.S. 577 (1992); *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000).

[17] *Santa Fe v. Doe*, 120 S.Ct. 2266 (2000).

[18] *See Chandler v. Siegelman*, 180 F.3d 1254 (11th Cir. 1999), *vacated and remanded* 120 S.Ct. 2714 (2000); *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999), *reh'g en banc denied* 183 F.3d 538 (6th Cir. 1999) in which the court found prayer at the opening of a school board meeting unconstitutional as substantially different from *Marsh v. Chambers*, 463 U.S. 783 (1983) since the meetings were a part of the school and attended by students amd were mandatory for those wishing to appeal disciplinary decisions.

[19] *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *accord* Santa Fe v. Doe, 120 S.Ct. 2266 (2000).

A. This Court has previously ruled that the practice of providing religious instruction on public school grounds is a violation of the Establishment Clause.

The Court has ruled that the practice of releasing students from regular school activities for religious education held on public school grounds violated the First Amendment[20]. *McCollum v. Board of Education of School District No. 17*, 333 U.S. 203 (1948) held unconstitutional the practice of providing released time for religious instruction in the public schools. The Court noted

> the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education . ... This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. .... To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not ... manifest a governmental hostility to religion or religious teachings.
>
> 333 U.S. 203 at 209 – 210.

The Court recognized that released time for religious instruction held off public school property is permissible in *Zorach v. Clauson*, 343 U.S. 306 (1952). However, in *Zorach* the students left the public school building to attend religious instruction. There the Court found no

[20] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

Establishment violation. The Court found that this merely accommodated the religious needs of students, "respect[ing] the religious nature of our people and accomodat[ing] the public service to their spiritual needs." 343 U.S. at 314.

More recently, the Court declined review of a Fourth Circuit Court of Appeals decision sanctioning a "weekday religion program" in which students received religious instruction in a mobile unit parked on the edge of school property.[21] In a Fifth Circuit case the court held a school's "Clergy in School" volunteer counseling program unconstitutional. The clergy were to offer counseling to students, but not proselytize. The court found that the program had the primary effect of advancing religion, caused excessive entanglement, was coercive, and an endorsement of religion. *Doe v. Beaumont Independent School District*, 173 F.3d 274 (5th Cir. 1999).

In *Doe v. Human*, 725 F.Supp. 1503 (W.D. Ark. 1989), *aff'd*, 923 F.2d 857 (8th Cir. 1990) the practice of providing elementary school children an opportunity to attend Bible classes held during school hours in the school building and taught by non-school volunteers was found to be unconstitutional. Applying the standards in *McCollum*, the court rejected all the district's distinctions. The court held that even though the religious instruction was "nondenominational", it was clearly Christian and therefore sectarian. When the court applied the *Lemon* test, it also found the classes constitutionally infirm; although it did acknowledge that the primary purpose of the course could have been a secular one – to build character and form moral values, it clearly had the primary effect of endorsing Christianity. The court rejected the argument that the principle of "equal access" enunciated in *Widmar* required the school to permit the classes, pointing out that there had

[21] *Smith v. Smith*, 391 F.Supp. 443 (W.D. Va. 1975), *rev'd* 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

been no policy of equal access at the school before this lawsuit and there was no history of other extracurricular activities being allowed a place in the school day.

Similarly, the rental of elementary school buildings immediately before and after school hours for holding of religious classes was found to be unconstitutional, where presence of school personnel, performing their official duties, juxtaposition of religious classes and secular classes, and use of public school facilities combined to give young children, including those present for religious classes, those present in school for other extracurricular activities, and those who were not present but who were aware that religious classes were being held, the erroneous impression of official school support. *Ford v. Manuel*, 629 F. Supp. 771 (N.D. Ohio 1985).

B. Under any standard of analysis for Establishment cases, allowing religious instruction in public elementary schools is unconstitutional.

The Court has used a variety of analyses to determine constitutionality in Establishment cases in the school setting. A chart of the various analyses used recently in these cases is displayed as an appendix. Three analyses predominate.

1. Lemon v. Kurtzman

Although the test set forth in *Lemon v. Kurtzman* has been criticized, decried and described as a somnolent ghoul[22], it has not been overruled.[23] Decided in 1971, *Lemon*

[22] *Lamb's Chapel v. Center Moriches Union Free School District,* (Scalia, J. dissenting).

[23] As stated by Justice White in *Lamb's Chapel: v. Center Moriches Union Free School District* " There is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled." 508 U.S. 384, 395 Fn. 7.

v. Kurtzman, 403 U.S. 602 (1971) incorporated the analyses of earlier cases, and formulated a three-prong test for determining whether the governmental action establishes religion. The first two prongs derived from *Abington*: "The test maybe stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222. The third prong, proscribing excessive entanglement with religion, is derived from *Walz v. Tax Commissioners of City of New York*, 397 U.S. 664 (1970) in which the Court upheld tax exemptions for properties used solely for religious worship.

2. Lemon II

Justice O'Connor's modification of the *Lemon* test, asks whether an objective observer would perceive the policy and its implementation "as a state endorsement" of religion in the public school. Justice O'Connor first propounded her modification of the *Lemon* test in a concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984) in which the Court upheld the City of Pawtucket's inclusion of a nativity scene in its Christmas display, on the ground that overall, the display had the legitimate secular purposes of celebrating Christmas the holiday and depicting origins of that holiday; the benefit to religion was perceived as "indirect, remote and incidental." *Id.* at 669. Justice O'Connor asserted that even if a governmental practice has the "primary effect" of advancing or inhibiting religion," what is crucial is that a government practice not have the effect of communicating a message of government

endorsement or disapproval of religion." In *Santa Fe* Justice Stevens concluded than an objective Santa Fe student "will unquestionably perceive the inevitable pre-game prayer as stamped with her school's seal of approval." *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 2278 (2000) .

3. Coercion

In 1989 in *Allegheny County v. Greater Pittsburgh American Civil Liberties Union*, 492 U.S. 573 (1989) the Court held unconstitutional the county's practice of displaying a nativity scene in the county courthouse during the Christmas season. Justice Kennedy dissented, opining that the *Lemon* test should not be "our primary guide in this difficult area" and, instead, a "coercion" test should be employed. "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." 492 U.S. at 662 – 663.

The common thread of all of these analyses is whether there is such a connection between the religious activity and the school that the imprimatur of the school is inevitably linked to the religious activity, regardless of whether the terminology used is endorsement, coercion, or primary effect. If the activity provides the appearance of preference to religious activity to the effected audience, a violation of establishment has occurred.

The Good News Club is a Christian organization for children between the ages of six and twelve. It is affiliated with the Child Evangelism Fellowship, a Christian missionary organization. The Second Circuit lays out the progression of "club meetings". 202 F.3d at 504- 505. The meetings are religious services and instruction for the

children, including prayer, witness, confession, and opportunities to be saved by receiving Jesus as savior. 202 F.3d at 507. It is clear that this is religious instruction, the same conclusion reached by the district court. Here, the Good News Club adopts a wholly religious demeanor in guiding children through a worship service[24]. This is not a film or instruction about religion; it is religious instruction, religious worship, and the inculcation of religion itself. There is a stark distinction between allowing a group to meet when it has an incidental connection to religion (such as Boy Scouts or 4-H) and allowing access to one whose quintessential meaning is to teach a specific religious doctrine, here, Christianity. The activities of the Scouts or the 4-H could exist in isolation, even without the organizational decision to incorporate a moral/religious dimension. By contrast, every Good News Club activity is infused with religious indoctrination and the entire purpose of the club is to impart the church's religious beliefs. But for the proselytizing and inculcation of religion, Good News would not exist.

The elementary school child who participates in the Good News Club will experience religious instruction during a natural extension of their school day. It is inevitable that the child will assume their church is a part of their school. For the child who does not participate in the after school religious instruction, it is inevitable that he/she will believe that there is a part of the school to which he/she does not rightly belong. These young children are left with the subtle coercion of joining the religious instruction or remaining outsiders within their own public school.

Under any of the Court's standards for determining an Establishment Clause violation, the regular use of elementary school premises for religious instruction and

[24] The nature of activity is as extreme as the distinction drawn in *Bronx Household of Faith v. Community School District No 10*, 127 F.3d 207 (2d Cir. 1997) between religious views and religious worship.

worship for elementary school children immediately at the close of school crosses the line.

C. The problem of a perceived endorsement of religion is heightened since the children involved are at a young and impressionable age.

The endorsement and coercion problems are exacerbated when one considers that the individuals involved here are young children[25] who would be even more likely to perceive an endorsement of religion when religious instruction is provided within their school building immediately after school. Courts have reached different conclusions on similar factual settings when the controlling difference has been the age of the children involved as an audience, i.e. when the religious practice has been moved from the university context to high schools to elementary schools.

For example in *Peck v. Upshur County Board of Education,* 155 F.3d 274 (4th Cir. 1998) the court found that an annual display of Bibles for optional student distribution was constitutional at the high school level, but unconstitutional at the elementary level. Noting what it believed this Court's holding might be on this distinction the court stated

> We can appreciate fully what might be the Court's thinking in this regard. In elementary schools, the concerns animated the coercion principle are at their strongest because of the impressionability of young elementary -age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech – a difference that lies at the heart of the neutrality principle -- the County's policy could more easily be (mis)perceived as endorsement rather than neutrality. Thus, because our obligation as a court of appeals is to reason as we believe the Supreme Court would, we do hold that the School Board's policy is unconstitutional to the extent that it allows display of Bibles and other religious material in the elementary schools of the County.

Peck, 155 F.3d at 288 n.

In *Widmar v. Vincent,* 454 U.S. 263 (1981) the University of Missouri had refused to allow a religious group the use of university facilities because of fear of an Establishment violation. The Court ruled that to refuse religious groups access to facilities while allowing other groups to use the same facilities violated the students' free speech rights. The Establishment issue in that case did not counterbalance the free speech rights. However, the Court noted the distinct difference between elementary and secondary schools and universities within the context of establishment of religion. "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Widmar v. Vincent,* 454 at 274 fn. 14; quoted with approval in *Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens,* 496 U.S. 226, 235 (1990).

In *Mitchell v. Helms,* 120 S.Ct. 2530, 2583 (2000)

> [W]e have expressed special concern about aid to primary and secondary religious schools. Tilton, 403 U.S., at 685-686, 91 S.Ct. 2091. On the one hand, we have understood how the youth of

[25] *Amici* imply that the relevant audience is parents, rather than the elementary children participating in the religious instruction. It is the perception of the elementary school children who are involved and their perceptions or misperceptions that is important here – do these children perceive that their church is an extension of their school. The perception of parents who sign permission slips for the after school religious instruction is only secondary.

the students in such schools makes them highly susceptible to religious indoctrination. Lemon, supra, at 616, 91 S.Ct. 2105 ("This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly"). *** Thus, government benefits accruing to these pervasively religious primary and secondary schools raise special dangers of diversion into support for the religious indoctrination of children and the involvement of government in religious training and practice.

And in *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) :

The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [Fn. 5 The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. "This distinction warrants a difference in constitutional results."] Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of

the State is it more vital to keep out divisive forces than in its schools.

It is clear in Supreme Court jurisprudence that constitutional standards for young children are in many cases different. Children are more impressionable and vulnerable and for those reasons we must be vigilant to guard against violations of their rights. For that very reason, the Equal Access Act, 20 U.S.C. 4071 – 4074 (2000) applies only to secondary schools, not elementary schools. The Act requires that whenever school districts permit other extracurricular clubs to meet, it must give equal access to student-led clubs that champion religious and political views. But the statute does not apply to elementary schools, adhering to the common wisdom that while secondary school students may be more likely to make independent judgments about religion, the same cannot be said of the younger, elementary -age children.

The bright line should be clear that adult-initiated worship and proselytizing has no place at the close of the elementary school day in part because of its potential for misunderstanding. It is that potential, coupled with the nature of the activity itself and the entanglements that it causes that makes an Establishment Clause violation egregious and inevitable. Even the best of intentions could lead to exploitation, teaching contrary to the wishes of parents, or misunderstandings by children of what is going on in classrooms normally reserved for subjects like math, science and reading rather than divine guidance and eternal salvation.

D. Prohibiting religious instruction to elementary children immediately after school does not result in hostility to religion.

This Court has noted that the state should not advance religion but neither should it be hostile to the

practice of religious beliefs.[26] Limiting religious instruction to off campus grounds is not hostile to religion more than necessary to comport with the Establishment Clause. It may be less convenient for parents to pick their children up from the church after their religious instruction, or transport them to and from the church for their religious instruction, rather than using the school's presence to gather and provide students on location for the purposes of receiving religious instruction. However, the convenience of parents does not rise to the level of a constitutional argument, nor does it prove school hostility to religion.

The practice of allowing students released time for religious instruction off school premises is sufficient to accommodate individual religious needs without running afoul of the Establishment Clause. Based on the Supreme Court action in this area many states have enacted laws outlining released time during public school hours for sectarian instruction conducted off school grounds.[27] Rejecting religious services and instruction to elementary children immediately after school on school grounds merely recognizes that some things are best left to personal conscience, and the direct influence of private decisions.

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[26] *E.g . Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819; *Zorach* at 314 – 315.

[27] California: Cal. Educ. Code 46014 (West 2000); Guam: 17 Guam Code Ann. 3107; Idaho: Idaho Code 33-519 (2000); Indiana: Ind. Code Ann. 20-8.1-3-22; Kentucky: Ky. Rev. Stat. Ann. 158.220 (2000); Maine: Maine Rev. Stat. Ann. Tit.20, 1224-A (2000); Massachusetts: Mass. Gen. Laws Ann. Ch. 76,1 (West 2000); Michigan: Mich. Comp. Laws Ann. 380.1561 (2000); Mississippi: Miss. Code Ann. 37-13-91 (2000); Montana: Mont. Code. Ann. 20-1-508 (2000); New Mexico: N.M.Stat. Ann. 22-12-3 (Michie. 2000); New York: N.Y. Educ. Law 3210 (2000); North Dakota: N.D. Cent. Code 15.1-19-04 (2000); Pennsylvania: 24 Pa. Cons. Stat. Ann. 15-1546 (West 2000); Rhode Island: R.I. Gen. Laws 16-2-16 (2000); South Dakota: S.D. Codified Laws 1333-10 (Michie 2000); Vermont: Vt. Stat. Ann. Title 16, 1055 (2000); West Virginia: W.Va. Code 18-8-1 (2000); Wisconsin: Wis. Stat. Ann. 118.155 (2000).

CONCLUSION

These are difficult questions, which may require lines to be finely drawn. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) We ask the Court to do "only what courts must do in many Establishment Clause cases – focus on specific features of a particular government action to ensure that it does not violate the Constitution." Id. at 852. The Second Circuit acted properly in its decision and should be upheld.

The Good News Club is seeking access to a forum not opened to others. Clearly, First Amendment analysis does not always require "the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants." *Rosenberger* at 862 (Thomas, J. concurring). But, this case is not that simple. The school had not opened an after-school forum, it had opened an evening forum for limited purposes. The district excluded all political, commercial and religious speech from the evening forum.

The exclusion of Good News from an afternoon forum can be justified as yielding to the Establishment Clause. The group can be excluded if to do otherwise would present a violation of the Establishment Clause. Here, Good News was proposing providing religious instruction, proselytizing and worship to elementary school children immediately after the school day on the school premises. Because of the impressionability of the children, the proximity of the activity to the regular school day, and the nature of the religious expression, i.e. worship and indoctrination, one must conclude that the reasonable elementary child would surmise that the religious instruction was endorsed by the district. As such, allowing the religious instruction to occur would create an Establishment Clause violation.

For the above reasons, these *amici* for the respondents urge this Court to affirm the Court of Appeals decision in this case.

Respectfully submitted,

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APPENDIX

Justices' Use of Analysis in Establishment of Religion Cases Involving Educational Settings

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Mitchell v. Helms	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2	L1,2
Santa Fe v. Doe	CC	C/L2E	C/L2E	CC	C/L2E	C/L2E	CC	C/L2E	C/L2E
Agostini v. Felton	L1,2	L1,2,3	L1,2	L1,2	L1,2	L1,2,3	L1,2	L1,2	L1,2,3
Rosenberger v. Rector	N/L2E	CC	N/L2E	N/L2E	N/L2E	CC	N/L2E	CC	CC
Kiryas Joel v. Grumet	A	CC	CC	A	CC	CC	A	CC	
Zobrest v. Catalina Foothills	CC	NA	NA	CC	A	CC	CC		
Lamb's Chapel v. Center Moriches	L2E	L2E	L2E	A	L2E	A	A		
Lee v. Weisman	A	C/L2E	C/L2E	A	C	C/L2E	A		
Westside v. Mergens	L2E	NA	L2E	C	C				
Edwards v. Aguillard	A	L2E	L2E	A					
Witters v. Washington	L1,2,3	L1,2,3	L2E						
Aguilar v. Felton	A	L2E	L2E						
Grand Rapids v. Ball	A	L2E	L2E						
Wallace v. Jaffree	A	L2E	L2E						
Mueller v. Allen	L1,2,3	L1,2,3							

L1 = 1st Prong of the Lemon test – legitimate secular purpose
L2 = 2nd Prong of the Lemon Test – primary effect neither advances nor inhibits religion
L3 = 3rd Prong of the Lemon Test - creates no excessive entanglement between state and religion
L2E = O'Connor's endorsement Analysis from Lynch v. Donnelly
C = Coercion or proselytizing analysis
CC = case comparison using Lemon or L2E cases; no explicit application of any "test."
A = Abandon Lemon Test
NA = no Establishment Clause analysis applied
■ = Authored an opinion (majority, plurality, concurrence, dissent)

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No. 99-2036

In The
Supreme Court of the United States

THE GOOD NEWS CLUB, ET AL.,
Petitioners,
v.
MILFORD CENTRAL SCHOOL,
Respondent.

On Writ of Certiorari To
The United States Court Of Appeals
For The Second Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NEW YORK CIVIL LIBERTIES UNION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF THE RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

Americans United for Separation of Church and State

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United has approximately 60,000 members nationwide and maintains active chapters in several states. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court.

American Civil Liberties Union and New York Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our country's civil rights laws. The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU. This case once again presents the Court with an alleged conflict between free speech rights and Establishment Clause obligations. As an organization deeply committed to both constitutional values, the ACLU believes that such cases must necessarily turn on the facts. Based on the facts, the ACLU supported the free

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[1]Letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

speech interest in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), and Capitol Square Review Board v. Pinette, 515 U.S. 753 (1995). On the other hand, the ACLU supported the Establishment Clause interest in Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), and Board of Education v. Mergens, 496 U.S. 226 (1990). In this case, the ACLU is persuaded that the totality of circumstances presents an unconstitutional risk that church and state will be impermissibly linked in the minds of the young schoolchildren involved. Accordingly, the ACLU respectfully submits this *amicus* brief in support of the respondent.

American Jewish Committee

The American Jewish Committee (AJC), a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC strongly supports the constitutional principle of separation of religion and government embodied in the Establishment Clause of the First Amendment. This principle, AJC believes, protects the religious freedom of members of minority faiths; protects the freedom of conscience of non-believers; and protects the government from debilitating power struggles among religious groups. AJC has participated as *amicus* in a wide array of cases in support of this vital principle.

People For the American Way Foundation

People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and

constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has more than 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning religious liberty and the separation of church and state. People For joins in this *amicus* brief in order to help vindicate the important First Amendment principle prohibiting government endorsement of religion.

SUMMARY OF ARGUMENT

This case calls for the Court to delineate the margins of its holding in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), in which the Court held that the Free Speech Clause required, and the Establishment Clause did not prohibit, the provision of access to a public high school auditorium by a religious group. Several of the undersigned *amici* submitted a brief in Lamb's Chapel in support of the Court's holding because various factors in the case combined to ensure that a reasonable observer would not perceive the religious activity at issue to be endorsed or sponsored by the school.[2]

The overwhelming lack of these factors in this case counsels the opposite result. Lamb's Chapel involved use of a public school during the evening hours; this case involves access shortly before the end of the school day and

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[2]A brief taking this position was jointly submitted by Americans United for Separation of Church and State, the American Civil Liberties Union, and People For the American Way Foundation.

immediately thereafter. The event in Lamb's Chapel was open to all members of the community, while the audience in this instance is limited to the school's elementary students. That case involved weekly use for five weeks; this one involves weekly use throughout the school year. That case involved similar uses by scores of community groups while, here, there are less than a handful of other outside groups, and not a single one of them holds meetings at the time requested by the Good News Club. In Lamb's Chapel, no school employee was involved in the showing of the film; in this case, it can be reasonably assumed that the age of the children and the timing of the meetings would necessitate the school's involvement and facilitation. Finally, that case involved the showing of a film series, while this one involves adults teaching a class using a format that is indistinguishable from typical classroom instruction.

These differences, in combination, create a seamless web between classroom instruction and religious indoctrination, such that a reasonable elementary school student would be unable to appreciate that the former instruction is school-sponsored while the latter is not. Accordingly, the requested access is proscribed by the Establishment Clause and was therefore properly denied.[3]

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[3]The Good News Club's application was denied pursuant to a Community Use Policy that prohibits the use of school premises "by any individual or organization for religious purposes." See Good News Club v. Milford Cent. Sch., 202 F.3d 502, 504 (2d Cir. 2000). While *amici* believe that the denial was justified because the Establishment Clause disallows the particular use in question, *amici* also believe that the literal language of the Community Use Policy raises free speech concerns to the extent that it prohibits greater amounts of speech

(continued...)

ARGUMENT

I. The Inter-Relationship Between the Free Speech and Establishment Clauses

A. The Free Speech Clause

In determining the extent to which government is required to allow access to its property and other avenues of communication, this Court employs a "forum analysis" that divides property into four categories: (1) traditional public fora; (2) designated public fora; (3) nonpublic fora; and (4) non-fora. See Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676-80 (1998).

Traditional public fora are those that the government has made available for expressive activity by long tradition or government fiat. See id. at 677. In such fora, a content-based exclusion is justified only when it is necessary to serve a compelling state interest and it is narrowly drawn to achieve that interest. See id.

Designated public fora arise when government takes purposeful action to open otherwise closed fora for public discourse. See id. If government makes the property available for indiscriminate use by the public, exclusions are evaluated under the same standards as apply in a traditional public forum. See Perry v. Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

Two types of fora -- those made available for use by certain speakers or for the discussion of certain subjects, which have often been referred to as "limited public fora" -- have not been consistently categorized. At times, the Court

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[3](...continued)
than is constitutionally permitted.

has categorized such fora as types of nonpublic fora, see, e.g., Lamb's Chapel, 508 U.S. at 393 (1993); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806 (1985); at other times, the Court has deemed them to be forms of designated public fora, see, e.g., Perry, 460 U.S. at 46 n.7; and at still other times, the Court has referred to speaker-limited fora as designated fora, and to subject-limited fora as nonpublic fora. See Arkansas, 523 U.S. at 677-78; International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992).

Despite this confusion, however, the standards that are applicable to restrictions on the use of limited public fora have become fairly clear in recent years. In a forum that is limited to a certain class of speakers, a content-based exclusion of a speaker who falls into the designated class is subject to strict scrutiny. See Arkansas, 523 U.S. at 677; Widmar v. Vincent, 454 U.S. 263, 269-70 (1981). Furthermore, in both speaker-limited fora and subject-limited fora, categorical distinctions must be reasonable in light of the purpose served by the forum. See Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel, 508 U.S. at 392-93. Finally, in both kinds of limited public fora, a viewpoint-based distinction will be upheld only if it is necessary to satisfy a compelling interest, such as compliance with the Establishment Clause. See Rosenberger, 515 U.S. at 837 (a viewpoint-based distinction is "excused by the necessity of complying with the Constitution's prohibition against state establishment of religion"); Lamb's Chapel, 508 U.S. at 394 ("[T]he interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech.") (internal quotation marks and brackets omitted); cf. Widmar, 454 U.S. at 271 ("[T]he interest of the University in complying with its constitutional obligations may be

characterized as compelling."); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761-62 (1995) ("[C]ompliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.").

In this case, the parties have agreed that the forum to which the plaintiffs seek access is a limited public forum. See Good News Club v. Milford Cent. Sch., 21 F. Supp. 2d 147, 153 (N.D.N.Y. 1998), aff'd, 202 F.3d 502 (2d Cir. 2000). However, the parties disagree on whether the exclusion of the Good News Club was based on content or viewpoint and, therefore, whether the operative test is one of reasonableness or strict scrutiny. In resolving this dispute, the lower courts sided with the Respondent, finding that the distinction between religious worship and instruction on the one hand, and speech from a religious viewpoint on the other, is one of content rather than viewpoint. See Good News, 202 F.3d at 511; Good News, 21 F. Supp. at 158.

Amici take no position on the lower courts' rationale. Rather, *amici* argue that the disallowance of the Good News Club meetings, under the requested terms, is necessitated by the Establishment Clause, and was therefore proper under even a strict scrutiny standard.

B. The Establishment Clause

A policy complies with the Establishment Clause if it has a secular purpose and does not advance or inhibit religion in its principal or primary effect. See Mitchell v. Helms, 120 S. Ct. 2530, 2540 (2000) (plurality); id. at 2560 (O'Connor, J., concurring); Agostini v. Felton, 521 U.S. 203, 222-23 (1997). A policy will be found to violate the effects prong of this test if a reasonable observer would perceive it to endorse religion. See County of Allegheny v. ACLU, 492 U.S. 573,

592 (1989); Agostini, 521 U.S. at 235; Lamb's Chapel, 508 U.S. at 395. By "endorsement," the Court is referring to governmental action that "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is *favored or preferred*." Allegheny, 521 U.S. at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)). The Court has stated this principle thus:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Id. at 593-94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). "[G]overnment practices relating to speech on religious topics 'must be subjected to careful judicial scrutiny,' and [] the endorsement test supplies an appropriate standard for that inquiry." Pinette, 515 U.S. at 778 (O'Connor, J., concurring) (quoting Lynch, 465 U.S. at 694 (O'Connor, J., concurring)).

Since its inception, the endorsement test has been concerned with both perceived and actual endorsement of religious speech. Thus, in the first case in which the test commanded a majority of the Court, the Court stated that "[t]he Establishment Clause, at the very least, prohibits government from *appearing to take a position on questions of religious belief*." Allegheny, 492 U.S. at 593-94 (emphasis added). A concern with the appearance of endorsement has played a significant, and recurrent, role in subsequent

decisions. See Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2278 (2000) (noting that a constitutional violation can rest on "actual or perceived endorsement"); Rosenberger, 515 U.S. at 850 (O'Connor, J., concurring) (addressing whether there is a "danger that the message of any one publication is perceived as endorsed by the University"); Lamb's Chapel, 508 U.S. at 395 (asking whether there is a "realistic danger that the community would think that the District was endorsing religion or any particular creed"); Widmar, 454 U.S. at 277 n. 14 (addressing whether students "could draw any reasonable inference" of government support).[4] Thus, the allowance of Good News Club meetings would violate the Establishment Clause if a reasonable observer would perceive the meetings to be endorsed by the school.

C. Reconciling the Free Speech and Establishment Clauses

Private speech that takes place in a public forum -- whether limited or unlimited -- is not normally deemed to be endorsed by the government. See, e.g., Widmar, 454 U.S. at 274; Lamb's Chapel, 508 U.S. at 395; Rosenberger, 515 U.S. 819. In the vast majority of cases involving a public forum, the nature of the forum -- the terms of its availability and its

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[4]A concern for both actual and perceived bias is common in legal standards that are designed to maintain and preserve institutional integrity and respect. Thus, the Federal Election Campaign Act is targeted at the prevention of both actual and apparent corruption of the political process. See Buckley v. Valeo, 424 U.S. 1, 53 (1976). Similarly, the Due Process Clause is concerned not only with fairness in meting out justice, but also with "the appearance of justice." Exxon Corp. v. Heinze, 32 F.3d 1399, 1403 (9th Cir. 1994).

use by a wide variety of persons or organizations -- is such that a reasonable observer is unlikely to perceive governmental endorsement of the speech that takes place there. See Rosenberger, 515 U.S. at 850 (O'Connor, J., concurring) ("The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University."); Lamb's Chapel, 508 U.S. at 395 (there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed" when a forum is used by a wide variety of private organizations); Widmar, 454 U.S. at 277 n.14 ("In light of the large number of groups meeting on campus . . . we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place.").

However, where the nature of a particular forum departs from the norm, and fosters rather than dispels the perception of government endorsement, the opposite conclusion is warranted:

> Where the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of "transferred endorsement," or mistaken attribution of private speech to the State, but because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement. At

> some point, for example, a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval. Other circumstances may produce the same effect -- whether because of the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue, among others. Our Establishment Clause jurisprudence should remain flexible enough to handle such situations when they arise.

Pinette, 515 U.S. at 777-78 (O'Connor, J., concurring) (citations omitted); see also id. at 772 (O'Connor, J., concurring) ("I see no necessity to carve out . . . an exception to the endorsement test for the public forum context."); id. at 775 (O'Connor, J., concurring) ("[O]ur prior cases do not imply that the endorsement test has no place where private religious speech in a public forum is at issue."); id. at 784-92 (Souter, J., concurring) (a mistaken, but reasonable, perception of governmental endorsement of speech that takes place in a public forum necessitates a finding of an Establishment Clause violation); Santa Fe, 120 S. Ct. at 2275 n.13 ("[W]e have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause.").

In this case, the forum in question is a public school, and the target audience for the message is the school's youngest children. If, as the Court has recognized, forbidden endorsement can occur in a full-fledged, traditional public forum such as a public park of sidewalk, where the messages are aimed at the public at large, surely it can occur in the context of an event held in a public elementary school that is aimed at an audience of impressionable young children. Such

a situation has arisen in this case.

II. A Reasonable Child Would Perceive School Endorsement If Good News Club Meetings Were to Take Place Under the Requested Conditions.

In Lamb's Chapel, this Court concluded, after engaging in a fact-intensive inquiry, that the circumstances were such that no reasonable observer would perceive the school to be endorsing the events in question. See 508 U.S. at 395. The circumstances in this case depart from those of Lamb's Chapel in virtually all salient respects; in this case, the cumulative effect of various factors counsels the opposite conclusion. Each of these factors will be addressed in turn below.[5]

- ***The children in question are aged six to twelve.***

The vantage point from which endorsement is evaluated is that of the reasonable, objective observer of the message in question. See Santa Fe, 120 S. Ct. at 2278; Pinette, 515 U.S. at 778 (O'Connor, J., concurring). In this case, the target audience for the Good News Club's message is children in kindergarten through seventh grade, who range

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[5]This would be a very different case, and *amici* could well come out the other way, if the totality of circumstances were different. Forbidden endorsement may occur under one set of facts but be lacking under a different, but closely related, set of facts. See Allegheny, 492 U.S. at 629 ("[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice.") (O'Connor, J., concurring).

in age from six to twelve. See S. Fournier Depo., J.A. at P19; Good News Club, 21 F. Supp. 2d at 149. It is through the eyes of these students that endorsement must be gauged. See Santa Fe, 120 S. Ct. at 2278 (the relevant reasonable observer of a high school graduation as "an objective Santa Fe High School student"); Board of Educ. v. Mergens, 496 U.S. 226, 249-52 (1990) (the relevant reasonable observer of clubs formed under the Equal Access Act is a secondary school student);[6] cf. Lamb's Chapel, 508 U.S. at 395 (the reasonable observer of an event that is open to the public is a member of the community).

The age of the children involved sets this case apart from all of the other access cases that the Court has decided to date. See Rosenberger, 515 U.S. at 823 (university students); Mergens, 496 U.S. at 250 (high school students); Widmar, 454 U.S. at 276 n.14 (university students); cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 959 F.2d 381, 384 (2d Cir. 1992) (community event held at

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[6]Some of the petitioner's *amici* disregard these cases and argue that the reasonable observer in this instance is a member of the community, rather than a child at the school. See Liberty Legal Inst. *Amicus* Br. at 15-19; Child Evangelism Fellowship *Amici* Br. at 7-19. While it is true that adult members of the community *may* become aware of Good News Club meetings that are held at the school, it is *certain* that the students who are invited to attend the meetings will do so. Indeed, the petitioner's *amici* ask the Court to disregard the perceptions of the very persons to whom the Good News Club directs its message. This request lacks a legal basis; the most that can be said for it is that there are two types of observers that have constitutional significance in this case. Because children are the more impressionable of the two, it is their perceptions that give rise to the greatest concern and the focus of this brief.

high school), rev'd, 508 U.S. 384 (1992). This factor has been pivotal to the Court's holdings in this area. In Widmar, 454 U.S. at 274 n.14, the Court observed that:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

Similarly, in Mergens, the Court relied on research in adolescent psychology to conclude that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250 (citing Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools, 92 Yale L.J. 499, 507-09 (1983) (summarizing this research)).

These observations have little meaning without recognition that pre-adolescent children, such as those in question here, are unable to appreciate this sophisticated distinction. Indeed, the research that the Court cited in Mergens, 496 U.S. at 250, demonstrates that the cognitive development required to make this distinction does not occur until adolescence. See Note, supra, at nn.42-44.

According to research by Jean Piaget, it is not until adolescence that a child's cognitive development is sufficient to allow him to think on an abstract, logical level, to reason by hypothesis, and to engage in independent analysis. See id. at n.42 (citing Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969)). Indeed, before this stage, a child lacks the ability to make distinctions between his views, others' views, and the views of his school. See Note, supra, at n.44 (citing

E. Erickson, Identity: Youth and Crisis 28, 30, 159-65, 246-47 (1968) (it is during adolescence that a child begins to form a coherent sense of self, which enables him to make distinctions between his views and the views of others)).[7] The capacity to appreciate the distinction between the school's views and the views of the groups that meet at the school is a necessary prerequisite to an appreciation of the distinction between neutrality and sponsorship, and it is one that is lacking in a pre-adolescent child.

It is for this reason that the United States Congress limited the Equal Access Act, which allows students to form religious clubs, to secondary schools. See 20 U.S.C. §§ 4071-74 (1994). The original draft of that bill applied to both elementary and secondary schools but, after hearings were held on the bill, elementary schools were omitted from coverage. See H.R. Rep. No. 98-710, at 2 (1984.); cf. S. Rep. No. 98-357, at 34 (1984) (quoting passage from court decision addressing maturity of high school students in contrast to elementary school students).[8] Because this

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[7] Thus, it would be entirely ineffective for the school to issue a "disclaimer" informing students that it does not endorse the Good News Club. A six-year-old may well be able to appreciate that something is "good" or "bad," but appreciating the shades of gray that fall between these two extremes requires a level of sophistication that such a young child is unlikely to have developed.

[8] Several witnesses testified at the hearings on the initial bill that elementary school children are unable to appreciate the distinction between neutrality and sponsorship, that they lack the maturity to undertake action without school supervision and involvement, and that they are particularly impressionable and

(continued...)

amendment was based in part on empirical determinations, see Mergens, 496 U.S. at 251, its import and relevance to the case at hand should not be lightly cast aside. See id.

Petitioners and their *amici* argue that perceptions are a "two-way street," so that a child who perceives endorsement from the meetings is likely to perceive hostility from their disallowance. See, e.g., Pet.'s Br. at 35; Laycock *Amicus* Br. at 5, 26-28; Liberty Legal Inst. *Amicus* Br. at 3, 12-15; Nat'l Council of Churches *Amici* Br. at 20. But disallowing the Good News Club meetings from proceeding under these circumstances is no more "hostile" to religion than the exclusion of school-endorsed prayer from the public schools, the prohibition against unobjective Bible study in the schools, and the prohibition against all other forms of religious speech

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[8](...continued)
subject to coercion and manipulation by others. See The Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the Comm. on Educ. and Labor, 98th Cong. (1983). At hearings on the amended bill, Professor Laurence Tribe supported the omission of elementary schools, stating that "the line between what is officially sanctioned, what is authorized, what is mandated may be so hard to draw" for children in the early grades, and "the impressionability and potential for coercion of very young children [is] so serious a problem." Religious Speech Protection Act: Hearings on H.R. 4996 Before Subcomm. on Elementary, Secondary, and Vocational Educ. of the Comm. on Educ. and Labor, 98th Cong. 48 (1984). Similarly, James M. Dunn, the Executive Director of the Baptist Joint Committee on Public Affairs, testified that elementary schoolchildren are limited in their "maturity of understanding" so that any "group religious activities of elementary school children facially would violate the establishment clause of the First Amendment." Id. at 33.

in contexts that are, or that appear to be, endorsed by the government. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (excluding school-endorsed prayer manifests "strict neutrality" rather than "hostility to religion"). This is because "the Establishment Clause requires the State to distinguish between 'religious' speech . . . and 'nonreligious' speech. . . . This distinction is required by the plain text of the Constitution." Widmar, 454 U.S. at 271 n.9. Thus, in situations that entail actual or perceived endorsement, a prohibition on religious speech reflects a respect for neutrality rather than a disrespect for religion.

- **Children aged 6-12** ***would be made available by the school immediately upon the conclusion of the school day.***

The Good News Club seeks to enter the school at 2:30 p.m., before the conclusion of the school day at 2:54 p.m. (see Resp.'s Br.), and to begin its classes at 3 p.m., a mere six minutes after the school day ends. See Use of Facilities Request Form, J.A. at W1. This request is patently designed to gain access to children who are at the school in plentiful and consistent numbers as a result of mandatory attendance laws. Good News Club teacher Darlene Fournier testified that she wants the club to meet at the school because the children are already there and it is thus "easier for the parents." D. Fournier Depo., J.A. at P100-P101. The efficacy of this strategy is demonstrated by the fact that when the club met at a local church, eight to ten students participated; but when it was moved to the school, more than twenty students did so. See S. Fournier Depo., J.A. at P12.

The timing of Good News Club meetings stands in sharp contrast to the events at issue in Lamb's Chapel, which

took place from 7 to 10 p.m. in the evening. See Lamb's Chapel, 959 F.2d at 384.[9] Here, the seamless transition from

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[9]The timing of the Good News Club meetings also sets this case apart from lower court decisions in this context, none of which involves a request to meet with elementary schoolchildren immediately upon the conclusion of the school day. See Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 209-11 (access to middle school for Sunday event), cert. denied, 523 U.S. 1074 (1998); Fairfax Covenant Church v. Fairfax County Sch. Bd., 17 F.3d 703, 705 (4th Cir. 1994) (Sunday use for community event); Good News/Good Sports Club v. School Dist., 28 F.3d 1501, 1502 (8th Cir. 1994) (event at junior high school for junior high school students); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1369 (3d Cir. 1990) (evening use of high school facilities); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676, 677 (2d Cir. 1988) (Sunday event for community at large); Campbell v. St. Tammany Parish Sch. Bd., No. Civ. A 98-2605, 1999 WL 562736 at *1 (E.D. La. July 30, 1999) (evening use for community event), rev'd, 206 F.3d 482 (5th Cir. 2000); Liberty Christian Ctr., Inc. v. Board of Educ., 8 F. Supp. 2d 176, 180 (N.D.N.Y. 1998) (Saturday use of high school facilities); Saratoga Bible Training Inst. v. Schuylerville Cent. Sch. Dist., 18 F. Supp. 2d 178, 181 (N.D.N.Y. 1998) (use of high school facilities for community event); Full Gospel Tabernacle v. Community Sch. Dist. 27, 979 F. Supp. 214, 216 (S.D.N.Y. 1997) (Sunday use for community event), aff'd, 164 F.3d 829 (2d Cir.), cert denied, 527 U.S. 1036 (1999); Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704, 706 (M.D. Ala. 1991) (Sunday event for high school students and their families); Randall v. Pegan, 765 F. Supp. 793, 794 (W.D.N.Y. 1991) (evening event for high school (continued...)

the instructional day to the Good News Club meetings would leave a reasonable elementary school student, who has the typical, limited cognitive abilities of students this age, unable to make the sophisticated distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Mergens, 496 U.S. at 250.

Furthermore, according to the Respondent's brief, in this case no other outside group meets at the school before 5 p.m. The unique nature of the Good News Club's meeting time renders the message of school endorsement even more pronounced. Indeed, allowing the meetings to take place at the requested time would entail special treatment that would cause a reasonable student to perceive that the school has a *preference* for this group over others.

- **Children aged 6-12 would be made available by the school immediately upon the conclusion of the school day *to two adults who have an ongoing presence at the school.***

It is undisputed that the Good News Club meetings will be led by adults; they are not student-initiated. See Pet.'s Br. at 7. Young children perceive adults as authority figures; it is not until adolescence that a child begins to set aside his

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[9](...continued)
students and their parents); Wallace v. Washoe County Sch. Dist., 818 F. Supp. 1346, 1348 (D. Nev. 1991) (Sunday use of high school for community event); Resnick v. East Brunswick Township Bd. of Educ., 389 A.2d 944, 947 (N.J. 1978) (evening and Sunday use).

belief in the infallibility of adult authority. See Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public Schools, 92 Yale L.J. 499 at n.42 (1983) (citing Jean Piaget, The Intellectual Development of the Adolescent, in Adolescence 23 (G. Caplan & S. Lebovici eds., 1969)). It is at this stage that a child begins to form a coherent sense of self and, in the process, begins to question and challenge the authority figures of his childhood. See id. at n.44 (citing E. Erikson, Identity: Youth and Crisis 28, 30, 259-65, 246-47 (1968)).

Given the undeveloped nature of their cognitive abilities, it is very unlikely that an elementary school student would be able to discern that one authority figure who teaches at the school on an ongoing basis -- the Good News Club teacher -- speaks on behalf of herself, while other authority figures -- those who teach before 2:54 p.m. -- speak on behalf of the school.

In recognition of the influence that adults have over students, even those older than the ones at issue here, the United States Congress included a provision in the Equal Access Act that provides that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071(c)(5). This Court relied in part on this prohibition in upholding the Equal Access Act against constitutional attack. See Mergens, 496 U.S. at 253.

Furthermore, elementary school age children reasonably believe that outsiders who come into the school do so with the school's approval. This is so to a much greater extent than in high schools. In fact, Superintendent Livshin testified at his deposition that District policy charges him with approving or disapproving all afterschool use of school facilities, and that he exercises substantial discretion in fulfilling this responsibility. See Livshin Depo., JA at N14, N19-N20. Thus, all outsiders on school premises after the

school day are, in fact, there with school approval, further contributing to an appearance of endorsement on the part of the school. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 269-74 (1988) (journalism teacher's exercise of editorial control was such that members of the public would, in this Court's view, reasonably perceive the newspaper to bear the imprimatur of the school).

The inability of young children to discern an authority figure's source of authority, the degree of discretion that is exercised over the access process, and the greater need of young schoolchildren for protection from outsiders all contribute to a reasonable student's perception that those who are granted access to the school bear the school's imprimatur.

- **Children aged 6-12 would be made available by the school immediately upon the conclusion of the school day, *on a weekly basis for the entire school year,* to two adults who have an ongoing presence at the school.**

The Good News Club seeks access to the school to hold a class every Tuesday throughout the school year. See Use of Facilities Request Form, J.A. at W1. Thus, the duration of the requested access is analogous to classroom instruction, thereby further diminishing a child's ability to distinguish one from the other. In contrast, in Lamb's Chapel, the use was of a much more limited duration -- one evening per week for five weeks -- which would enhance a student's ability to distinguish the film events from classroom instruction. See 959 F.2d at 384.

- **Children aged 6-12 *would likely be escorted by their school teachers*, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, to a class conducted by two adults who have an ongoing presence at the school.**

Although the record is silent on this point, it is reasonable to assume that the age of the children involved in this case would necessitate the school's facilitation of the Good News Club meetings through dissemination and monitoring of parental permission slips, distribution of information about the meetings, shepherding children to the class, and various other facilitative activities. See J.A. at X2 (copy of parental permission slip submitted to school by Good News Club); Pet.'s Br. at 7 (noting that parental permission is required for a child to attend meetings). A child who is sent home with a permission slip, much like the one his parents complete to allow him to participate in a school-sponsored field trip, is likely to perceive this as the school's promotion of the event.[10]

Professor Laycock argues that endorsement is not present in this case because endorsement "must be based on something the government did," rather than on the government's passive, non-preferential grant of access to a forum available to others. Laycock *Amicus* Br. at 28. That argument is misguided in this case in two respects.

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[10]The students' impression of endorsement would be increased even further if the Good News Club's meetings were advertised through the school newspaper, bulletin boards, the public address system, and other resources available for the dissemination of information, as contemplated in Mergens, 496 U.S. at 247.

First, by Professor Laycock's own standard, the school's behavior amounts to endorsement, as its role in this case would be far from passive or non-preferential. While high school children may be able to take initiative, to walk from one class to the next without teacher supervision, and to disseminate and monitor parental permission slips, elementary schoolchildren cannot assume this level of responsibility and it is therefore reasonable to assume that the role that an elementary school must play to facilitate meetings is substantially greater than that required in a high school. By undertaking this facilitation, mandating children's attendance at school, and then allowing an outside group to come in *before* the end of the school day at a time when no other groups are granted access, the school's role in this case would be both active and preferential.

Second, Professor Laycock blurs the distinction between actual and perceived endorsement. He spends the bulk of his *amicus* brief asserting that *actual* endorsement of a message occurs only when the government selects, delivers, encourages, arranges for, or grants preferential access to the message. See Laycock *Amicus* Br. at 9-11. When he addresses the "branch" of the endorsement test that focuses on *perceived* endorsement, Professor Laycock states that the "observer's perception must be based on . . . some form of preferential treatment for religious speech -- some special privilege, or some manipulation of process to ensure that the religious speaker gets an advantage." See id. at 28-29. But by his own terms, preferential treatment is a form of *actual* endorsement; under Professor Laycock's formulation, the perceived endorsement branch of the endorsement test is superfluous and he has, in effect, cut it off the tree.

The conflation of perceived endorsement with preferential access cannot be reconciled with the rationale that underlies the endorsement test. See Pinette, 515 U.S. at

787 (Souter, J., concurring) (limiting endorsement to government expression or favoritism would render meaningless the Establishment Clause's concern with the "effects" of government action); id. at 799 (Stevens, J., dissenting) (a prohibition on endorsement in appearance, if not in fact, gives effect to the paramount purpose of the Establishment Clause of protecting persons from being made to feel like outsiders in matters of faith, and strangers in the political community). For this reason, a majority of the Court has explicitly rejected Professor Laycock's formulation of the perceived endorsement test. See id. at 777 (O'Connor, J., concurring) ("The [Establishment] Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message.") (citations omitted); id. at 807-10 (Stevens, J., dissenting) (the Establishment Clause proscribes situations in which some reasonable observers would attribute a religious message to the State, even though the State has shown no preference for this message over non-religious ones).

- **Children aged 6-12 would be escorted by their school teachers, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, *to join other students from the school* in attending a class that is taught by two adults who have an ongoing presence at the school.**

The target audience for the Good News Club meetings is schoolchildren, rather than all members of the community. See Pet.'s Br. at 9. In Lamb's Chapel, the Court

found no danger that the community would perceive school endorsement because the events in question "would have been open to the public, not just to church members." 508 U.S. at 395; see also Pinette, 515 U.S. at 767 (Scalia, J., writing for a plurality) (noting that access was constitutionally permissible in Lamb's Chapel in part because "the event was open to the public").

The inclusion of non-school persons in the audience of an event that takes place at a public school places some distance between the school and the event, thereby minimizing any impression of school-sponsorship; opening the event to the community at large does so to an even greater degree. The lack of any "buffer zone" factors in this case increases the nexus between the Good News Club meetings and the school, and thereby fosters the impression of school-sponsorship, particularly in the mind of a young, impressionable child.

- **Children aged 6-12 would be escorted by their school teachers, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, to join other students from the school in attending a class that is taught by two adults who have an ongoing presence at the school, *using a format that is indistinguishable from that of typical classroom instruction*.**

Each Good News Club class is led by a teacher who is guided by formal lesson materials, see Good News, 21 F. Supp. 2d at 155, the classes follow a format in which students are rewarded for good behavior, see Depo. of S. Fournier, J.A. at P22, and classes end with a homework assignment. See Good News, 21 F. Supp. 2d at 154, 157 (noting that class

ends with distribution of Bible verses for memorization).[11] In Lamb's Chapel, the requested use did not follow this format; rather, it involved a six-part film series, held during the evening, and open to the public at large. See 508 U.S. at 387, 395. Because of the timing, audience, and nature of the event, a student attending the Lamb's Chapel events would be highly unlikely to mistake them for classroom instruction. In contrast, the similarities between the Good News Club meetings and regular classroom instruction render one virtually indistinguishable from the other to a pre-adolescent child.

- **Children aged 6-12 would be escorted by their school teachers, immediately upon the conclusion of the school day, on a weekly basis for the entire school year, to join other students from the school in attending a class that is taught by two adults who have an ongoing presence at the school, using a format that is indistinguishable from that of typical classroom instruction, *at a time when no other groups are meeting*.**

The record makes reference to only three student groups that avail themselves of the school's facilities: Boy Scouts, Girl Scouts and 4H Club. See Good News, 21 F. Supp. at 154; Pet.'s Br. at 5-6, 17 n.3. Furthermore,

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[11]In addition, the meetings that took place during the course of the preliminary injunction were held in a room that is used for instruction during the school day, see Livshin Depo., J.A. at N12-N13, rather than in the cafeteria as the Good News Club originally requested. See Use of Facilities Request Form, J.A. at W1.

according to the Respondent's brief, none of these groups, nor any others, holds its meetings immediately after the school day.

This stands in sharp contrast to Lamb's Chapel, 508 U.S. at 391, where "the District's property is heavily used by a wide variety of private organizations"; to Rosenberger, 515 U.S. at 825, where 118 student groups had received funding under the program in question; to Mergens, 496 U.S. at 231, where there were 30 recognized students clubs from which students could choose;[12] to Widmar, 434 U.S. at 277, where there were over 100 recognized student groups; and to Pinette, 515 U.S. at 757, where the square in question had been used for a variety of speeches, gatherings, and festivals for over a century.

The number and breadth of other uses has been an important factor in the Court's decisions. Thus, in Mergens, the Court stated as follows:

> [T]he broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs counteract any possible message of official endorsement of or preference for religion or a particular religious belief. To the extent that a religious

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[12]In passing the Equal Access Act, Congress found that the students' impression of school endorsement will be diminished because "[a]ny . . . student desiring to participate [in a student-initiated religious club] would . . . have to reject the various other secular activities available to him and go to the room where those few other students who have a common interest would be meeting for religious activities." S. Rep. No. 98-357, at 28 (1984).

> club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion.

Mergens, 496 U.S. at 252 (citation omitted).

In the absence of a truly robust forum that includes the participation of several advocacy-oriented groups, the presence of a religious club provides a fertile ground for peer pressure. It is precisely in a school without a robust forum that the non-representation of other groups is most coercive, and that a student who does not share the religion of his classmates is likely to believe that his religion is disfavored.

In Mergens, the Court recognized the possibility of peer pressure, but dismissed it on the ground that any such pressure is not "official" because no formal classroom activities are involved and no school officials actively participate. See 496 U.S. at 251. This argument may be persuasive where the children involved are able to understand the difference between the government and private actors, and where students are old enough to have a sense of control and responsibility over their own time and whereabouts before and after the school day. However, where children, because of their young age, are unable to appreciate this distinction, and are highly dependent on adults for every aspect of their existence at school -- before, during, *and* upon the conclusion of the school day -- this argument loses much of its force. In the latter setting, the state cannot disclaim its responsibility for the students' presence at the school, the peer pressures that pertain to afterschool activities,[13] and the

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[13]Research on child psychology demonstrates that peer pressure carries far greater weight among younger children than (continued...)

messages that the school's behavior reasonably conveys to the children in its charge.[14]

Conclusion

No child between the ages of six to twelve, under the circumstances of this case, can reasonably be expected to appreciate that, despite all of the similarities between Good

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[13](...continued)
among those aged fourteen or older: "[C]onformity is at its height among the early adolescent group but [] it diminishes significantly from about fourteen or fifteen onward." Note, The Constitutional Dimensions of Student-Initiated Religious Activity in the Public High Schools, 92 Yale L.J. 499 at n.43 (1983) (citing Coleman, Friendship and the Peer Group in Adolescence, in Handbook of Adolescent Psychology 424-25 (J. Adelson ed., 1980)).

[14]Because of the existence of Second Circuit precedent limiting the breadth of the factual inquiry necessary in a case of this kind, the record in this case is largely undeveloped. For example, no specific evidence was presented to the Court below regarding the times at which other student groups meet, the role played by the school to facilitate the meetings that took place during the time that the preliminary injunction was in effect, and the impressionability of young children. If the Court finds that the paucity of the factual record renders it unable to determine whether an elementary school student would perceive endorsement of the Good News Club meetings, the Court should remand the case for development of additional facts relevant to the endorsement inquiry. See Lynch, 465 U.S. at 693-694 (O'Connor, J., concurring) (endorsement entails both a factual and legal assessment).

News Club classes and his or her other classes, the latter, but not the former, are school-sponsored. Accordingly, *amici* urge the Court to affirm the decision of the court below.

Respectfully submitted,

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